167-88

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. ~~548~~ 239

THE WABASH RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF DEFIANCE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

FILED MARCH 2, 1895.

(15,811.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

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THE WABASH RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

THE CITY OF DEFIANCE.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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a The United States of America to The City of Defiance, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, to be holden at the city of Washington, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Ohio, wherein The Wabash Railroad Company is plaintiff in error and you, said The City of Defiance, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Hon. Thaddeus A. Minshall, chief justice of the supreme court of the State of Ohio, this 26th day of February, A. D. 1895.

THAD. A. MINSHALL,
Chief Justice of the Supreme Court of Ohio.

Acceptance of service of this citation is hereby acknowledged this 27th day of February, A. D. 1895.

J. F. DEATRICK,
Mayor of the said City of Defiance.

b In the Supreme Court of the State of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE CITY OF DEFIANCE, Defendant in Error. } No. 3965.

To the honorable the chief justice of the said supreme court:

Whereas in the judgment, decision, and proceedings of the said supreme court of Ohio in the above-entitled cause error has intervened, as claimed by the said plaintiff in error, to its prejudice, and whereas said judgment, decision, and proceedings are reviewable by the Supreme Court of the United States on writ of error, as will appear from the record thereof, the said plaintiff in error, by Henry Newbegin, its attorney, hereby respectfully petitions that a writ of error may be allowed, directed to the said supreme court of the State of Ohio, commanding said court to send to the said Supreme Court of the United States the record and proceedings aforesaid, so that the same may be there examined and reviewed and such judgment pronounced thereon as by the said Supreme Court of the United States may seem right and proper; and that a citation may be issued to the said defendant and a supersedeas allowed to the said plaintiff.

HENRY NEWBEGIN,
Attorney for Petitioner.

It is hereby ordered that the petition of the said plaintiff in error for said writ of error, citation, and supersedeas be, and the same are hereby, granted this 26th day of February, A. D. 1895.

THAD. A. MINSHALL,
Chief Justice of the Supreme Court of Ohio.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, between The Wabash Railroad Company, plaintiff in error, and The City of Defiance, defendant in error, a manifest error hath happened, to the great damage of the said The Wabash Railroad Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington in thirty days from this date next, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Circuit Court, South'n Dist. of Ohio.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 26th day of February, in the year of our Lord one thousand eight hundred and ninety-five.

B. R. COWEN,
Clerk of the Circuit Court of the United States for the Southern District of Ohio,
By C. P. WHITE, *Dep. Clk.*

Allowed by—
THAD. A. MINSHALL,
Chief Justice of the Supreme Court of Ohio.

d *Assignment of Errors.*

In the Supreme Court of the United States, October Term, A. D. 1894.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE CITY OF DEFIANCE, Defendant in Error.

Said plaintiff in error says that there is error in the record and proceedings of the supreme court of the State of Ohio in this cause, in this, to wit:

First. The supreme court of Ohio erred in finding, holding, and deciding that the ordinances of the city of Defiance of date February 7th, 1893, were not laws impairing obligation of the contract made by said city of Defiance with the receiver of the Wabash, St. Louis & Pacific Railway Company by virtue of the ordinance of December 26th, 1887, and as such in contravention of the provision of section 10 of article 1 of the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts.

Second. That said supreme court of Ohio erred in not finding, holding, and deciding that the ordinances of the city of Defiance of date Feb'y 7th, 1893, were laws impairing obligation of contract made by said city of Defiance with the receiver of the Wabash, St. Louis & Pacific Railway Company by virtue of the ordinance of December 26th, 1887, and as such were void, as being in contravention of the provisions of section 10 of article 1 of the Constitution of the United States, that no State shall pass any law impairing the obligation of contracts.

e Third. That the said judgment of the supreme court of the State of Ohio is contrary to the Constitution and laws of the United States, in this, to wit, that said supreme court of Ohio, against the claim of the plaintiff in error, decided that the ordinances of February 7th, 1893, set forth in the record, were valid ordinances and not in contravention of any of the provisions of section 10 of article 1 of the Constitution of the United States.

4th. That said judgment of the supreme court of Ohio is in contravention of the provisions of the Constitution of the United States, in this, to wit, that by holding said ordinances of February 7th, 1893, valid it deprives the said plaintiff in error of its property and of the use and enjoyment thereof without compensation and without due process of law, as is provided in the 14th amendment to the Constitution of the United States.

5. That said judgment of said supreme court of Ohio also will compel the said plaintiff in error to pay taxes without notice, and thereby, by holding said ordinances of February 7th, 1893, valid, will deprive the plaintiff of its property without due process of law.

6. The judgment and decision of the said supreme court of Ohio in affirming the judgment of the said circuit court of Defi-

f ance county are contrary to the provisions of the Constitution of the United States, as will appear from the record of the case.

Wherefore said plaintiff in error respectfully prays the court that the said judgment and proceedings of the said supreme court of Ohio may be here reviewed and the errors therein corrected, said judgment reversed, and this plaintiff in error restored to all that it has lost thereby.

HENRY NEWBEGIN,
Attorney for Plaintiff in Error.

g In the Supreme Court of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE CITY OF DEFIANCE, Defendant in Error. } Bond.

Know all men by these presents that we, The Wabash Railroad Company, as principal, and Sheldon C. Reynolds, as surety, are held and firmly bound unto the City of Defiance, in the State of Ohio, in the penal sum of $1,000.00; to the payment of which, well and truly to be made, we do hereby bind ourselves, our successors and administrators.

The condition of the foregoing obligation is such that—

Whereas the said The Wabash Railroad Company has applied for a writ of error from the Supreme Court of the United States to the supreme court of the State of Ohio for a reversal of the judgment of the said supreme court of the State of Ohio in the above-entitled case in favor of said defendant in error and against said plaintiff in error:

Now, if the said The Wabash Railroad Company, plaintiff in error, shall prosecute its said writ to effect and if it fail to make good its plea shall answer all damages and costs which may be awarded against it, then the foregoing obligation shall be void; otherwise shall remain in full force and virtue.

In witness whereof we have hereto set our hands and seals this 26th day of February, A. D. 1895.

S. C. REYNOLDS. [SEAL.]
THE WABASH RAILROAD COMPANY,
By HENRY NEWBEGIN, [SEAL.]
Its Attorney.

h STATE OF OHIO, } *ss:*
Lucas County, }

Personally appeared before the undersigned, a notary public within and for the county aforesaid, Sheldon C. Reynolds, who, being duly sworn, says that he is the owner in his own right and name of real and personal property of the full value of one hundred thousand dollars ($100,000) over and above all incumbrances, liens, and exemptions of every kind and description.

S. C. REYNOLDS.

Sworn to before me and subscribed in my presence this 25th day of February, 1895.

[Notarial Seal, Lucas Co., O.]

GEO. B. ORWIG,
Notary Public, Lucas County, Ohio.

Taken and approved by me this 26th day of February, A. D. 1895.

THAD. A. MINSHALL,
Chief Justice Supreme Court, State of Ohio.

i [Endorsed :] Supreme court of *of* Ohio. The Wabash Railroad Company, plaintiff in error, *vs.* The City of Defiance, defendant in error. Bond.

j *Syllabus.*

THE WABASH RAILROAD COMPANY
v.
THE CITY OF DEFIANCE. } 3965.

Error to the circuit court of Defiance county.

WILLIAMS, *J.:*

1. Where part of a county road is taken into a municipal corporation by the annexation of contiguous territory, it is subject to the control and supervision of the municipal authorities, who may improve it, by grading, or otherwise, at the expense of the corporation. Section 4906, of the Revised Statutes, does not apply to unimproved county roads.
2. A bridge, in such portion of the road, over a railroad track, constitutes a part of the highway, and may be removed, when the council deem it necessary for the public convenience to make the crossing at grade.
3. When the resolution declaring the necessity of a proposed street improvement has been passed, and published, and notice thereof given as required by section 2304, of the Revised Statutes, to an owner whose property will be taken or injured in the making of the improvement, and he fails to file his claim for compensation or damages, in accordance with section 2315, Revised Statutes, his claim is waived, and barred.
4. An owner who has been afforded an opportunity of having compensation and damages assessed him, in the constitutional mode, for property taken or injured in the making of a street improvement, but failed to avail himself of the opportunity at the proper time, cannot enjoin the improvement, on the ground that compensation has not been paid or tendered him.
5. The powers conferred on municipal corporations with respect to the opening, improving, and repairing of their streets and public ways, are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interest may require, and they cannot be granted away, or relinquished, or their exercise suspended, or abridged, except when, and to the extent legislative authority is expressly given, to do so; such authority is not given by section 3283, of the Revised Statutes.
6. Every grant, in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and

liberally in favor of the public, and never extended beyond its express terms, when not indispensable to give effect to the grant.

7. An ordinance, which in terms authorizes a railroad company to erect new bridges of a specified description, over the track of its railway where it crosses designated streets, the bridges to be kept in repair by the company, does not divest the municipal authorities of their control over the streets, nor impair their power to improve the same, nor entitle the railroad company to perpetually maintain the bridges as constructed; but the ordinance, and privilege granted by it, are subject to a proper exercise by the municipal body, of its power to improve the streets, and make such changes in the grades as may be necessary to subserve the public interest.
8. The comparative dangers in the use of grade and overhead crossings, and the relative public benefits and private disadvantages that may result from a contemplated improvement of the streets, are matters for the consideration of the members of the council, who are the sole judges of the propriety, as well as of the necessity of the improvement, and their decision, when not transcending their powers, nor induced by fraud, is not subject to judicial revision.
9. When a case is tried to the court, the extent to which expert testimony shall be received, rests largely in its discretion.

Judgment affirmed.

Dickman, C. J., and Burket, J., dissent.

(For opinion see side page 73.)

k STATE OF OHIO, *City of Columbus,*

Supreme Court of the State of Ohio, of the Term of January, A. D. 1895, to wit, February 5th, 1895.

THE WABASH R. R. Co. *vs.* THE CITY OF DEFIANCE. } Error to the Circuit Court of Defiance County.

This cause came on to be heard upon the transcript of the record of the circuit court of Defiance county and was argued by counsel; on consideration whereof it is ordered and adjudged by this court that the judgment of the said circuit court be, and the same is hereby, affirmed; and, it appearing to the court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein. It is further ordered that the defendant in error recover from the plaintiff in error its costs herein expended, taxed at $—.

Whereupon, on motion of said plaintiff in error, this court orders it to be, and it is hereby, certified and made a part of the record in

this case and of the above entry and judgment of affirmance that said plaintiff in error specially set up and claimed in this court that the said ordinances of the said defendant of February 7th, 1893, passed under authority of the State of Ohio, if carried into effect, were repugnant to the Constitution of the United States, especially of article 1, section 10, thereof, in this, that they were laws impairing the obligation of the contract made by the said defendant with the said plaintiff by its ordinance of December, 1887, set forth in the said plaintiff's petition in the court of common pleas; and, further, that said plaintiff claimed in this court that said ordinances of the defendant of February 7th, 1893, if carried into effect, would deprive the plaintiff of its property without due process of law in this, that without compensation therefor it would deprive the plaintiff of the free and uninterrupted use and enjoyment of the said highways named in its petition, acquired under the said ordinance of December, 1887.

And this court hereby further orders it to be, and it is hereby, certified that the said judgment and decision of affirmance of this court were and are against the said claims of the said plaintiff under the Constitution of the United States.

Ordered that a special mandate be sent to the circuit court of Defiance county to carry this judgment into execution.

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing entry is truly taken and correctly copied from the records of said court, to wit, from Order Book No. 14, pages 66 & 76.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this 26th day of February, A. D. 1895.

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

l [Endorsed:] Supreme court of the State of Ohio. No. 3965. The Wabash R. R. Co. *vs.* The City of Defiance. Certified copy of entry.

m In the Supreme Court of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE CITY OF DEFIANCE, Defendant in Error. } No. 3965.

Error to the circuit court of Defiance county.

Record.

Alex. L. Smith and Henry Newbegin, attorneys for plaintiff.
Wm. H. Hubbard and B. B. Kingsbury, attorneys for defendant.

1 In the Supreme Court of Ohio.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE CITY OF DEFIANCE, Defendant in Error. } Petition in Error. No. 3965. Filed April 3d, 1894.

Record.

Said plaintiff in error says, that at the February term, A. D. 1894, of the circuit court of Defiance county, in an action therein pending, wherein this plaintiff in error was plaintiff, and said defendant in error was defendant, a final judgment and decree were rendered and made against this plaintiff in favor of the said defendant. This plaintiff in error files herewith certified copies of the orders, judgment and decree of the said circuit court, by it complained of, with the original pleadings and papers on which the same was tried, including the bill of exceptions taken during the trial of said cause in the circuit court, and says that there is error in the record and proceedings of the said circuit court in this, to wit:

1st. Said court erred in its rulings and orders made during the trial of said cause in excluding and refusing to hear competent and relevant testimony and evidence offered to be given in evidence by the plaintiff, to which the plaintiff, by its attorneys, duly excepted at the time; and in receiving in evidence and hearing incompetent and irrelevant evidence and testimony over the objection of the said plaintiff, to which the plaintiff duly excepted at the time.

2 2d. Said court erred in its findings made against the plaintiff.

3d. Said court erred in overruling and not granting the plaintiff's motion for a rehearing of this cause.

4th. Said court erred in its order dissolving the injunction theretofore granted in favor of the plaintiff.

5th. Said court erred in its judgment and decree dismissing the said plaintiff's petition, and for costs against the plaintiff.

Wherefore the plaintiff in error prays the court that the said orders, judgment and decree of the said circuit court may be reversed, and this plaintiff be restored to all that it lost thereby.

HENRY NEWBEGIN,
ALEX. L. SMITH,
Attorneys for the Plaintiff.

Original Petition.

Original petition, filed in the court of common pleas, Defiance county, Ohio, March 2, 1893.

THE WABASH RAILROAD COMPANY, Plaintiff,
vs.
THE CITY OF DEFIANCE, Defendant.

The Wabash Railroad Company, for cause of action herein, says that it is a corporation, duly organized under the laws of the State of Ohio, for the purpose of maintaining and operating a railway, and as such now owns and operates a line of railway through the city of Defiance. The defendant, The City of Defiance, is a municipal corporation of the State of Ohio aforesaid.

Said line of railway was formerly owned and operated by the Wabash, St. Louis & Pacific Railway Company, and during the years 1887 and 1888, was operated by one John McNulta, as receiver, appointed by the United States circuit court for northern district of Ohio, western division, in a certain cause pending in said court, wherein James R. Jesup *et al.*, were complainants, and The Wabash, St. Louis & Pacific Railway Company *et al.*, were defendants; which suit had been instituted for the purpose of foreclosing the
3 railway mortgages upon all the railway property of said Wabash, St. Louis & Pacific Railway Company.

That in the year 1887 said line of railway crossed two certain public streets or highways in said city, known as the Holgate pike and the Brunnersburg road, respectively, at a grade about eighteen feet below the grade of said streets, at the crossing of said railway and said streets; and that there were two overhead wooden bridges over the said line of railway at about the distance aforesaid above the track of said railway.

And thereupon, on the 26th day of December, 1887, the city council of said city of Defiance duly passed an ordinance in words and figures following, to wit:

An Ordinance

Permitting Wabash, St. Louis & Pacific railway to construct bridges at Holgate pike and Brunnersburg road.

Be it ordained, by the council of the city of Defiance, Ohio:

SECTION 1. That the Wabash, St. Louis & Pacific Railway Company is hereby authorized to erect new bridges over and across the track of the railway of said company where the same crosses the public street in the Third ward of said city, known as the Brunnersburg road, and Holgate pike, provided said bridges shall be of good and substantial construction, placed in the center of said street, be eighteen feet wide roadway, with good and substantial sidewalk eight feet wide on each side of said bridges, with proper railings on

each side of said walks, said bridges and sidewalks to be at all times kept in good order and repair by said company. And said railway company is hereby further authorized to construct each of said bridges of sufficient height to give a distance of twenty-one feet in the clear between the tops of the rail of said railway at its present grade and the bottom of the floor beams of said bridges, provided always that said company shall provide and construct good and sufficient approaches and grade to each of said bridges, and extend the same to sufficient distance to give a grade of not to exceed one and one-fourth inches to the foot, and to conform to the width of the present street, said grade to be made firm and solid by either stone or gravel, at the option of said company, provided that if gravel be used, said city will permit it to be taken from their gravel bed without charge, and to construct and keep in constant repair good and proper approaches to said sidewalks, and brought to the proper level of the present walk by broad, safe steps where the grade would be too great for a safe incline; all to be done to the approval of the city, and all to be kept in repair to the extent of said company's right of way at all times by said company.

SECTION 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges.

SECTION 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Done at the council chamber in regular session this 20th day of December, 1887.

Attest: JAS. A. KITCHEL, *City Clerk.*

I, Jas. A. Kitchel, do hereby certify that the foregoing ordinance was published in the Defiance Democrat, a paper of general circulation in said city and county.

JAS. A. KITCHEL, *City Clerk.*

Said ordinance was duly published according to law.

Said ordinance was passed for the purpose of allowing and permitting said McNulta, as receiver of said railway, to construct said bridges.

And thereupon said McNulta, acting as receiver aforesaid, caused the overhead bridges described in said ordinance to be constructed, and as a part of said structures caused the necessary approaches to be constructed at large cost and expense to said receivership, to wit: of more than $2,300.

Said work was done under and by virtue of the authority of said ordinance and in all respects in conformity thereto; and all the terms and conditions imposed by said ordinance upon said railway and its receiver, have been faithfully kept and performed by him and by plaintiff since it was placed in possession of said railway property under the orders of said court as hereinafter stated.

That thereafter said railway property was sold under the decree and orders of said United States court, and such proceedings were had as that plaintiff became the purchaser under said decree
5 and orders, and under said orders, became vested with all the said railway property and all rights, assets, choses in action belonging to said receiver as such, including all rights arising under said ordinance and the acts of the receiver thereunder.

And plaintiff says that on or about the 7th day of February, 1893, the city council of said city of Defiance, in utter disregard of the rights vested in said receiver and plaintiff by the foregoing ordinance and the action taken thereunder, and the orders and decrees of said court as above set forth, passed two ordinances in words and figures following, viz:

An Ordinance

To improve part of North Clinton street, in the city of Defiance, Ohio, and providing for the payment of the costs and expense of said improvement.

Whereas, the city council of the city of Defiance, Ohio, at its meeting duly held at the council chamber in said city on the sixth day of September, A. D. 1892, duly passed and adopted a certain resolution declaring it necessary to improve part of North Clinton street, in said city, between the points hereinafter specified and in the manner hereinafter provided; and

Whereas, due publication of said resolution has been made, and more than twenty days' written notice of the passage of said resolution has been given to each and all of the owners of property abutting on said improvement, in all respects as required by law and in conformity to said resolution; and

Whereas, more than two weeks have elapsed since the service of said notice and the completion of said improvement have been filed with the city clerk of said city. Now,

Therefore, be it ordained by the city council of said city of Defiance, Ohio, as follows:

SECTION 1. That the said improvement of that part of North Clinton street, formerly known as Center street and Holgate pike, in the city of Defiance, Ohio, which extends from the distance of twenty-five (25) feet north of the south line of the intersection of High street with said North Clinton street to the distance of nine hundred (900) feet north of said south line of said intersection of High street, be proceeded with, in accordance with said resolution, by changing the grade of that part of said street, and excavating and grading the same to the following grade, to wit: Com-
6 mencing at a point in the center of said North Clinton street, twenty-five (25) feet north of a point in the center of said street and in the south line of the intersection of High street therewith, at a distance of sixty-nine hundredths ($\frac{69}{100}$) of a foot lower than the water table on the store building of George Miller, and running thence north along the center of said North Clinton street, ascending at the rate of twenty-five hundredths ($\frac{25}{100}$) of a foot in

each one hundred feet, for the distance of three hundred and twenty-five (325) feet: thence descending at the rate of four and fifty-hundredths (4 and $\frac{50}{100}$) feet in each one hundred feet, for the distance of two hundred (200) feet; thence at a level for the distance of fifty (50) feet; thence ascending at a rate of four and forty-seven hundredths (4 and $\frac{47}{100}$) feet in each one hundred feet, for the distance of three hundred (300) feet, and there to terminate, in conformity to the profiles, plans and specifications on file in the office of the city civil engineer of said city, to which reference is hereby expressly had and made, and which said grade, plans, profiles and specifications are hereby approved, established, adopted and confirmed.

SECTION 2. That the costs and expenses of said improvement shall be paid out of the general fund, and levied and assessed upon the general tax-list upon all real and personal property in the corporation.

SECTION 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Passed February 7, 1893.

EDWARD SQUIRE,
President of the Council.

Attest: J. J. MALLEY, *City Clerk.*

THE STATE OF OHIO, }
City of Defiance, } *ss:*

I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

J. J. MALLEY, *City Clerk.*

Defiance, Ohio, February 7, 1893.

An Ordinance

To improve part of Ralston avenue, in the city of Defiance, Ohio, and providing for the payment of the costs and expense of said improvement.

7 Whereas, the city council of the city of Defiance, Ohio, at its meeting duly held at the council chamber in said city on the sixth day of September, A. D. 1892, duly passed and adopted a certain resolution declaring it necessary to improve part of Ralston avenue, in said city, between the points hereinafter mentioned and in the manner herein provided;

And whereas, due publication of said resolution has been made and more than twenty days' written notice of the passage of said resolution has been given to each and all of the owners of property abutting on said improvement, in all respects as required by law, and in conformity to said resolution;

And whereas, more than two weeks have elapsed since the service of said notice and the completion of said publication, and no claims for damages by reason of said improvement have been filed with the city clerk of said city, now, therefore;

Be it ordained, by the city council of Defiance, Ohio, as follows:

SECTION 1. That the said improvement of that part of Ralston avenue, formerly known as the Brunersburg road, in the city of Defiance, Ohio, which extends from its intersection with North Clinton street to a point six hundred (600) feet northwesterly from the center of said intersection, be proceeded with, in accordance with said resolution, by changing the grade of that part of said Ralston avenue, and excavating and grading the same to the following grade, to wit: Commencing at the center of the intersection of said Ralston avenue and North Clinton street, at the distance of six-hundredths ($\frac{6}{100}$) of a foot lower than the water table on the store building of George Miller, and running thence northwesterly along the center of said Ralston avenue, descending at the rate of five (5) feet in each one hundred feet, for the distance of two hundred (200) feet; thence on a level for the distance of fifty (50) feet; thence ascending at the rate of two and ninety-hundredths (2 and $\frac{90}{100}$) feet in each one hundred feet for the distance of three hundred and fifty (350) feet, and there to terminate, in conformity to the plans, profiles and specifications on file in the office of the city civil engineer of said city, to which reference is hereby expressly had and made, and which said grade, plans, profiles and specifications are hereby approved, established, adopted and confirmed.

SECTION 2. That the costs and expenses of said improvement shall be paid out of the general fund, and levied and assessed upon the general tax-list on all real and personal property within the corporation.

SECTION 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Passed February 7, 1893.

EDWARD SQUIRE,
President of Council.

Attest: J. J. MALLEY, *City Clerk.*

THE STATE OF OHIO, }
City of Defiance, } *ss:*

I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

J. J. MALLEY, *City Clerk.*

Defiance, Ohio, February 7, 1893.

Said public highway known as Holgate pike being referred to in said last-named ordinances as North Clinton street, and said Brunersburg road is referred to therein as Ralston avenue.

That the sole purpose, object and effect of said ordinances is to cause the said overhead bridges and the approaches thereto over said Holgate pike and Brunersburg road to be entirely destroyed and removed, and the crossing of said highways over said railway track reduced to a crossing at the same grade as plaintiff's said track. And said city of Defiance is now threatening and intending forthwith to destroy and remove said bridges and approaches.

Plaintiff avers that if said city of Defiance be allowed to carry out said purpose, said crossings will be extremely dangerous to all persons having occasion to use the same by reason of the fact that the track of said railway at said points is far below the ordinary level of the highways, and the roads as graded by said last-named ordinances will approach said tracks at a steep downward incline on both sides; that said railway track at said points is on a heavy grade which renders it very difficult to control the speed of the heavy trains of plaintiff, and thus the danger of a grade crossing is vastly increased.

The plaintiff says that for many years prior to the passage of said first-mentioned ordinance, to wit, since the year A. D. 1856, the railway track of the plaintiff had been crossed by said highways by overhead crossings consisting of bridges about eighteen feet in the clear above the level of the tracks. That said highways then, as now, crossed the railway track at points near together, to wit,
9 about 196 feet and converge so as to meet at a distance of about 70 feet from the railway right of way. That the track of said railway at said crossings lies in a deep cut, about eleven or twelve feet below the natural surface of the ground, and is on a heavy down grade and curve, and on one of said highways buildings are so located as to almost, if not entirely, cut off the view of approaching trains from persons approaching said track from the southerly side of the same. That if said crossings are reduced to grade, as proposed by said ordinances, the approaches to said track will be down a steep inclined plane on both sides of said track, on both said highways; so that at said crossings the said highways will be cut to a depth of about eleven and one-half feet below the adjacent lands. That it will be almost, if not quite impossible for heavily loaded teams to stop for trains when approaching said track; and that by reason of the deep cuts both of said railway and highways in which said crossings will be located and of the curve and grade of said railway at said points, the sound of any signal and the sound and sight of approaching trains will be cut off and said crossings will be excessively difficult and dangerous to the lives of persons crossing plaintiff's track along said highways, and to the lives, limbs, and property of its passengers and patrons, being carried on the trains of the plaintiff, on account of unavoidable accidents and collisions there happening, and that thereby there will be cast upon the plaintiff an additional burden and liability to its said passengers and the public. That the natural conformity of the land at said crossing is such as to make overhead bridge crossings of said public highways over plaintiff's said track absolutely essential to the public safety.

That said crossings, since the construction of said track to the present time, for a period of time of about thirty-seven or thirty-eight years have been by means of overhead bridges at said public highways over the plaintiff's track, and at a height above said track of about eighteen feet, down to December, A. D. 1887, the date of the ordinance first hereinabove named when it became necessary for the safety and protection of the trains and trainmen of the plain-

tiff, on account of the increased height and size of the cars composing its trains, to raise said bridges to their present height, to wit, about twenty-one feet above plaintiff's said track, as was done by agreement with the said defendant under and by virtue of said ordinance first hereinabove named.

That at the time the said railway was constructed by the
10 original railroad company incorporated under the laws of the State of Ohio, for that purpose, and to all of whose rights and franchises this plaintiff has succeeded, said bridges were constructed as a part of the highways over said railway track in restoring of the highways to their original usefulness, as said railroad company was required to do under the law; and said bridges have been kept up and maintained by said original railroad company and its successors, including this plaintiff, to the present time, as an integral part of said highways and as public crossings over its said track solely at the expense of this plaintiff and its said predecessors. That some time in the year A. D. 1878, the village council of the then village of Defiance, since organized as the city of Defiance, passed an ordinance requiring the Wabash Railway Company, a predecessor aforesaid of the plaintiff, to construct a sidewalk on one side of the said overhead bridge of the said Brunersburg road, there having been up to that time no sidewalks on either of said overhead bridges. That the said railway company objected and refused to do this, giving to the said village council as its reason therefor, that said bridge was a part of said Brunersburg road and which was a county road and under the entire and sole control of the county commissioners of said Defiance county. It was finally agreed between the said railway company and the said village of Defiance, that said railway company would construct a sidewalk on the left side of said bridge going northward on the express condition that it should not thereafter be considered as obligated to keep the same in repair or renew the same after that it had become unfit for use, to which the said village assented and the said railway company did so construct said sidewalk, but whether said agreement was reduced to an ordinance and entered on the records of said village, this plaintiff is ignorant; and this plaintiff says that by its requirement of the said railway company to construct said sidewalk at the height said bridge then was over said track, the said village recognized the grade of said Brunersburg road as established at that height, and also by the ordinance first set forth herein the defendant recognized and agreed with this plaintiff that the grade of both of said highways was and should be thereby established and fixed at the height of twenty one feet above the plaintiff's said track and that the defendant is thereby estopped from requiring this plaintiff to remove its said overhead bridges and to construct grade crossings of said highways over its
11 said track. That further the grading down of said highways as proposed by said ordinances for that purpose will be an appropriation of the plaintiff's property, and will also cast an additional burden upon the plaintiff in the establishing and maintaining of new grade crossings over its said track, for which no com-

pensation has been provided in money for the plaintiff, and no tender thereof made to the plaintiff; without which first being done the carrying out of said last-named ordinances will be contrary to the provisions of the constitution of the State. That said last-named ordinances are by reason of the premises unreasonable, unlawful, dangerous and oppressive and contrary to sound public policy.

Plaintiff further says that said last-named ordinances are contrary to public policy and void for the following reason, to wit: That they were passed as plaintiff is informed and believes, not for public benefit, but for the private advantage of the owners of property lying adjacent to said bridges and approaches. That one Joseph Ralston is a member of the said city council of Defiance, and voted in favor of the said ordinances, and as plaintiff is informed, was highly instrumental in securing their adoption. And plaintiff says that said Ralston is the owner of a piece of property lying adjacent to said railway track on Ralston avenue, so called, that said Ralston, on or about the 3d day of March, 1890, recovered a judgment against said John McNulta, receiver, by the consideration of the court of common pleas of Defiance county, Ohio, in the sum of $431.25, which this plaintiff has paid in full, pursuant to an order subsequently made by the United States circuit court, northern district of Ohio, western division, in said foreclosure suit, as damages resulting to his premises from the elevation of said bridge on said highway under said first-named ordinance, and plaintiff charges on information and belief that in seeking and procuring the passage of said last-named ordinances, said Ralston intended to benefit his own property to the great damage of the general public, and to retain the damages paid him for the elevation of said roadway in front of his premises. Plaintiff alleges and charges the fact to be that said last-named ordinances, although in form ordinances to change the grade of the said streets, are in fact aimed solely at this plaintiff, and are intended simply to bring about the destruction and removal of said bridges and as such are an abuse of power on the part of said council, and that said ordinances are therefore contrary to public policy and void. That if said defendant be
12 allowed to carry out the provisions of said ordinances, this plaintiff will by reason of the premises suffer irreparable injury.

Plaintiff further says that the ordinances last named of said city council of Defiance impair the obligation of the contract made by the city with said receiver in said first-named ordinance, and the acts of the said receiver and plaintiff thereunder; and as such are in contravention of the provisions of section ten (10), of article one (1), of the Constitution of the United States; but that, as your plaintiff is informed, and believes, said city and its officers and agents now give out and claim that said ordinance of 1887 is of no binding force or effect, and conferred no rights upon said receiver, and therefore affords no protection to plaintiff in the premises.

This plaintiff further says that said Brunersburg road and said Holgate pike have been for a time long prior to the construction of the plaintiff's said railroad track continuously to the present time,

and still are, State or county roads, and as such subject to the entire control of the board of county commissioners of said county of Defiance; that said overhead bridges, as above alleged, constitute an integral part of said public highways; that the defendant has no power or jurisdiction over the same so far as to interfere with the said overhead bridges of the plaintiff or to grade down or change the grade of said highways, as contemplated by said last-named ordinances; and that so far as said ordinances are intended to change the grade of said highways or to interfere with the plaintiff's said bridges and crossings, they and each of them are absolutely void.

Second. Plaintiff further says, referring to the allegations hereinbefore set forth as to the passage by the defendant and the intent and purpose of said last-named ordinances, and adopting said allegations as a part of this, its second cause of action, that it is the owner of a line of railway extending through the said city of Defiance, and of other valuable property therein situated, all of which is subject to assessment and taxation therein; that it is purposed by the said defendant, if it carries into effect the provisions of the said ordinances for the so-called improvement of said Ralston avenue and North Clinton street, to assess the expense of said improvements upon the property of the tax-payers of said city generally, and that the plaintiff thereby will have its said property charged with taxes to pay for the expense of said proposed improvements; that
13 the said Ralston avenue and North Clinton street are other names merely for the said Brunersburg road and Holgate pike, both of which are State and county roads and under the entire control and management of the board of county commissioners of said Defiance county, and that all repairs and improvements of the same should be in law made at the expense of said county; that it is not competent in law for the defendant to assess or tax the property of the tax-payers, including this plaintiff, of the said city of Defiance for the improvement and repairs of said public highways in any sum whatever.

Plaintiff therefore, having no adequate remedy at law, prays that the court will protect it in the enjoyment of all and singular, the rights and property transferred to it by said receiver, under the orders of said circuit court of the United States; that said city of Defiance, its officers, agents and servants, may be enjoined from carrying said ordinances into effect, and from in any manner destroying or taking away said overhead bridges and the approaches thereto. That, if necessary to protect the plaintiff in its rights, said ordinances may be vacated.

That a provisional order of injunction be made restraining them from further proceedings thereunder, and on final hearing, said order be made perpetual, and for such other and further relief as may be just and equitable in the premises.

ALEXANDER L. SMITH,
HENRY NEWBEGIN,
Attorneys for Plaintiff.

STATE OF OHIO, } ss:
Defiance County, }

Henry Newbegin, being first duly sworn, says that he is one of the attorneys for The Wabash Railroad Company, the plaintiff in the above-entitled petition, and that the matters and allegations set forth in said petition are true in substance and in fact, except such as are charged on information and belief, which affiant verily believes are true.

HENRY NEWBEGIN.

Sworn to before me, and in my presence subscribed, this 1st day of March, A. D. 1893.

EDWIN PHELPS.
Deputy Clerk.

14 *Answer.*

THE STATE OF OHIO, } ss:
Defiance County, }

In the Court of Common Pleas.

THE WABASH RAILROAD COMPAN , Plaintiff, } No. 4615. Answer.
vs. } (Filed March 28,
THE CITY OF DEFIANCE, Defendant. } 1893.)

Now comes the defendant, The City of Defiance, and admits and avers that it is a municipal corporation of the State of Ohio.

It further admits that the plaintiff is a corporation, duly organized under the laws of the State of Ohio, for the purpose of maintaining and operating a railway, and that as such it now owns and operates a line of railway through said city of Defiance, which said line of railway was formerly owned and operated by the Wabash, St. Louis & Pacific Railway Company, and was, during the years of 1887 and 1888, operated by one John McNulta, as receiver, appointed by the United States circuit court for the northern district of Ohio, western division, in a certain cause then pending in said court, wherein James R. Jessup *et al.*, were complainants, and The Wabash, St. Louis & Pacific Railway Company *et al.*, were defendants; which suit had been instituted for the purpose of foreclosing the railway mortgages upon all the railway property of said Wabash, St. Louis & Pacific Railway Company.

It further admits and avers that, in the year 1887, and for many years prior thereto, and ever since, the said line of railway crossed two certain public highways and streets in said city, one of which was then known as Holgate pike and is now known as North Clinton street, and so designated in the ordinance set forth in the petition, and the other of which was then known as the Brunersburg road, and is now known as Ralston avenue and so designated in the ordinance set forth in the petition, at a grade below the surface of said streets at the crossings of said railway and said streets, but denies that the track of said railway was more than sixteen feet below such surface of said streets, or either of them.

And defendant further admits that there were then two overhead, wooden bridges over the line of said railway, but denies that they or either of them were any greater distance above said track
15 than sixteen feet. It further admits that, since the year 1856, the track of said line of railway has been crossed by said highways by overhead crossings, consisting of bridges, but denies that at any time prior to the construction of the present bridges in the year 1887, said bridges were more than sixteen feet in the clear above the level of said track.

It admits that said highways at all times since said year 1856, have crossed and now do cross said railway track at points about 196 feet from each other, and that they converge so as to meet at a distance of about seventy feet from the railway right of way.

It admits that the track of said railway at said crossings lies in a cut, and is upon a curve, and that at the time that said railway was constructed by the original railroad company incorporated under the laws of the State of Ohio for that purpose, overhead bridges on said Holgate pike and the Brunersburg road, were constructed by said original railroad company as part of said public highways over and across said railway track, but it avers that said bridges were kept and maintained by said original railroad company and its successors for that purpose, at a height of not more than sixteen feet above the surface of the track of said railway, until some time prior to the year 1887, when the Wabash, St. Louis & Pacific Railway Company, or the said John McNulta as receiver, as aforesaid, wrongfully removed said bridges, and in place thereof wrongfully and unlawfully constructed the present bridges and raised said new bridges to the height of more than twenty-one feet above the surface of the track of said railway, and wrongfully and unlawfully raised the approaches to said last-mentioned bridges to correspond with the said increased height of said present bridges, and said Wabash, St. Louis & Pacific Railway Company and said receiver and said plaintiff have since kept up and maintained said bridges at said height of more than twenty-one feet above the surface of the track of said railway, and have kept and maintained said approaches at the corresponding height.

It admits that the said Holgate pike and the Brunersburg road were originally laid out, established and opened as county roads of said county of Defiance, Ohio, and admits that at the time and for a long time after said original bridges were built as aforesaid, said highways were under the exclusive control of the board of county commissioners of said county, but it avers that, at the time of the removal of said bridges and the construction of the present
16 bridges, and for a long time prior thereto, each of said highways, at its crossing and intersection of said railway, for a long distance on each side thereof, had become and was, and still is, within the territorial limits of said city of Defiance, and had become, and was and still is a public highway and street of said city, and within the exclusive care, supervision and control of the council of said city, and that neither of said present bridges is or ever became or was the property of said county of Defiance, or under

the control of said county, or of the board of county commissioners thereof.

And said defendant admits and avers that on the 7th day of February, A. D. 1893, the two ordinances mentioned and set forth in the petition and entitled, respectively, "An ordinance to improve part of North Clinton street, in the city of Defiance, Ohio, and providing for the payment of the costs and expense of said improvement," and "An ordinance to improve part of Ralston avenue, in the city of Defiance, Ohio, and providing for the payment of the costs and expense of said improvement," were each passed by the city council of said city, and that each of said ordinances is in the words and figures set forth in said petition, and that said defendant, unless restrained by the final order, judgment and decree of the court in this action, intends to and will construct said improvements in conformity to the terms and provisions of said several ordinances, and assess the expense of said improvements upon the property of the tax-payers of said city generally.

And defendant further says: that the city council of said city of Defiance, at its regular meeting duly held at the council chamber in said city, on the sixth day of September, A. D. 1892, duly passed two certain resolutions, more than two-thirds of the whole number of members elected to said council concurring therein, which said resolutions are in the words and figures following, to wit:

A Resolution

Declaring it necessary to improve part of North Clinton street, in the city of Defiance, Ohio, between the points therein designated, and in the manner therein provided.

Be it resolved, by the city council of the city of Defiance, Ohio,
That it be and hereby is declared necessary to improve that
17 part of North Clinton street, in said city, formerly known as Center street and Holgate pike, which extends from the distance of twenty-five (25) feet north of the south line of the intersection of High street with said North Clinton street, to the distance of nine hundred (900) feet north of said south line of said intersection of said High street, by changing the grade of that part of said street, and excavating and grading the same to the following grade, to wit: Commencing at a point in the center of said North Clinton street, twenty-five (25) feet north of a point in the center of said North Clinton street and in said south line of said intersection of High street, at the distance of sixty-nine hundredths ($\frac{69}{100}$) of a foot lower than the top of the water table on the store building of George Miller, and running thence north, along the center of said street, ascending at the rate of twenty-five hundredths ($\frac{25}{100}$) of a foot in each one hundred feet, for the distance of three hundred and twenty-five (325) feet; thence descending at the rate of four and fifty hundredths (4 and $\frac{50}{100}$) feet in each one hundred (100) feet, for the distance of two hundred (200) feet; thence at a level for the distance of fifty (50) feet; thence ascending at the rate of four and forty-seven hundredths (4 and $\frac{47}{100}$) feet, in each one hundred (100) feet,

for the distance of three hundred (300) feet, and there to terminate, in conformity to the plans on file in the office of the city civil engineer.

That the cost and expenses of said improvement shall be levied and assessed upon the tax-list, upon all real and personal property in the corporation.

And that William E. Carpenter be, and he hereby is appointed to serve notice of the passage of this resolution on all owners of property abutting on said improvement; and the city clerk is hereby directed to cause this resolution to be published as required by law.

Done at the council chamber in said city, this 6th day of September, 1892.

H. D. BOKOP,
President pro Tem. of Council.

Attest: J. J. MALLEY, *City Clerk.*

THE STATE OF OHIO, }
City of Defiance, } *ss*:

I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

J. J. MALLEY, *City Clerk.*

Defiance, Ohio, September 14, 1892.

18 *A Resolution*

Declaring it necessary to improve part of Ralston avenue, in the city of Defiance, Ohio, between the points therein designated, and in the manner therein provided.

Be it resolved, by the city council of the city of Defiance, Ohio, That it is necessary to improve that part of Ralston avenue, in said city, formerly known as the Brunersburg road, which extends from its intersection with North Clinton street, to a point six hundred (600) feet northwesterly from the center of said intersection, by changing the grade of that part of said street, and excavating and grading the same to the following grade, to wit: Commencing at the center of the intersection of said Ralston avenue and North Clinton street, at a distance of six-hundredths ($\frac{6}{100}$) of a foot lower than the top of the water table on the store building of George Miller, and running thence northwesterly along the center of said Ralston avenue, descending at the rate of five (5) feet in each one hundred (100) feet, for the distance of two hundred (200) feet; thence on a level for the distance of (50) fifty feet, thence ascending at the rate of two and ninety-hundredths (2 and $\frac{90}{100}$) feet in each one hundred (100) feet, for the distance of three hundred and fifty (350) feet, and there to terminate, in conformity to the plans on file in the office of the city civil engineer.

That the costs and expenses of said improvement shall be levied

and assessed upon the tax-list, upon all taxable real and personal property, in said city.

And that William E. Carpenter be, and he hereby is appointed and directed to serve notice of the passage of this resolution on all owners of property abutting on said improvement; and the city clerk is hereby directed to cause this resolution to be published as required by law.

Done at the council chamber in said city, this 6th day of September, 1892.

H. D. BOKOP,
President pro Tem. of Council.

Attest: J. J. MALLEY, *City Clerk.*

THE STATE OF OHIO, }
City of Defiance, } *ss:*

I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

J. J. MALLEY, *City Clerk.*

Defiance, Ohio, September 14, 1892.

19 That both of said resolutions were duly published for two consecutive weeks in the Defiance Democrat, a newspaper published and of general circulation in said city of Defiance, beginning on the — day of September, 1892, and written notice of the passage of each of said resolutions was duly served upon the plaintiff, on the 10th day of October, A. D. 1892, but the said plaintiff did not, at any time, file any claim in writing with the clerk of said city, for damages by reason of said improvements, or either of them, by reason of which said failure to file such claim the said plaintiff has waived the same and is barred from claiming or receiving damages by reason of said improvements, or either of them.

Said defendant further admits that the one Joseph Ralston, at the time of the passage of said ordinances was and still is a member of the council of said city of Defiance, Ohio, but it avers that said ordinances were passed by the vote in favor thereof of more than two-thirds of the number of all the members elected to said council, exclusive of the vote of the said Joseph Ralston in favor thereof.

And said defendant denies each and every matter, fact and thing, and each and every statement, allegation and averment in said petition contained, stated and set forth, and not hereinbefore expressly and specifically admitted to be true.

Wherefore, having fully answered, said defendant prays that it may be dismissed hence with its costs.

W. H. HUBBARD,
City Solicitor.

(Duly verified.)

Reply. Filed May 13, 1893.

Said plaintiff in reply to the answer of defendant denies that the said public highways named in its petition ever became subject to

the supervision and control of the defendant for other than police purposes.

HENRY NEWBEGIN,
Attorney for Plaintiff.

(Duly verified.)

20 *Judgment of Court of Common Pleas.*

THE WABASH RAILROAD COMPANY } Journal 15, Page 151. No.
vs. } 4615.
THE CITY OF DEFIANCE. }

MAY 24, 1893.

This day come the parties, each by its attorneys, and the court having heard the evidence and arguments of counsel at a former day of this term, and being now fully advised in the premises, finds the equity of the case with the defendant.

It is therefore adjudged and decreed that the plaintiff's petition be and the same is hereby dismissed at plaintiff's costs of suit, amounting to $——, for which execution is awarded.

And therefore the said plaintiff, by Henry Newbegin, its attorney, gave notice of its intention to appeal this suit to the circuit court of this county, and moved the court to fix the amount of the bond for that purpose, and the court hereby orders that the amount of the said appeal bond be and the same is hereby fixed at two hundred dollars.

(Duly certified by clerk.)

Orders and Final Decree of Circuit Court.

THE STATE OF OHIO, } *ss:*
Defiance County, }

In Circuit Court, in Vacation.

THE WABASH RAILROAD COMPANY, Plaintiff, } Journal, Vol. 1,
against } Pages 232, 233,
THE CITY OF DEFIANCE, Defendant. } 241–257. Order.

On the application of the said plaintiff by Henry Newbegin and Alexander L. Smith, its attorney, and for good cause shown, it is ordered that the application of the plaintiff for an injunction pending the hearing of the issues herein as prayed for in its petition, be set for hearing before the judges of this court at the court-house, in the city of Findlay, Ohio, on the 13th day of June, 1893, at three o'clock p. m., of said day, and that notice of the time and place of said hearing be given to said defendant or its attorneys five days in advance thereof. And in the meantime it is ordered that the said

21 defendant, The City of Defiance, be restrained from enforcing or carrying into effect the ordinance complained of in the petition herein, and from in any manner, destroying, taking away or interfering with the overhead bridges and the approaches

thereto named in the petition upon the said plaintiff giving an undertaking with surety to the satisfaction of the clerk of this court in the penal sum of $1,000, conditioned according to law.

So done and ordered this 29th day of May, A. D. 1893.

JOHN J. MOORE,
HENRY W. SENEY,
Judges of the Circuit Court of Defiance County, Ohio.

THE STATE OF OHIO, *Defiance County,* } ss:

In the Circuit Court.

THE WABASH RAILROAD COMPANY, Plaintiff,
vs.
THE CITY OF DEFIANCE, Defendant. } Order.

On the application of said defendant, by W. H. Hubbard, its solicitor, before the undersigned, Henry G. Baker, probate judge of said county, and for good cause shown, it appearing that the judges of the circuit court are each and all absent from said county of Defiance, it is ordered that the application of the defendant for an injunction against the plaintiff, pending the hearing of this cause, in said court upon its merits be set for hearing before me, or if the said judges of the circuit court, or any or either of them, shall then be within said county of Defiance, before said circuit judge or judges, at the court-house in the city and county of Defiance, on the 17th day of June, A. D. 1893, at the hour of nine o'clock a. m. of said day, and that at least five days' notice of said hearing be given by said defendant to said plaintiff or its attorneys prior to the time so fixed for the hearing thereof.

And it is further ordered that until the hearing of said application, the said plaintiff be, and it hereby is restrained from replacing or restoring the bridge on the Brunnersburg road, otherwise called Ralston avenue, over the said plaintiff's railway, and the earth heretofore taken from the approach thereto or any part thereof, upon the said defendant giving to the plaintiff an undertaking with surety to the satisfaction of the clerk of said circuit court in the sum of two hundred dollars, conditioned according to law.

So done and ordered this 30th day of May, A. D. 1893.

HENRY G. BAKER,
Probate Judge of Defiance County, Ohio.

22 In the Circuit Court of Defiance County.

THE WABASH RAILROAD COMPANY
vs.
THE CITY OF DEFIANCE. } Order.

On this 13th day of June, A. D. 1893, before Hon. John J. Moore, Henry W. Seney and James H. Day, the judges of said court, sitting at chambers in the city of Findlay, in said circuit, came on to be

heard, the motion of the said plaintiff for an interlocutory injunction as prayed for in its petition and was submitted upon the affidavits filed in the case and argued by counsel.

Upon consideration whereof the said judges find that said motion is well taken and should be and the same is hereby granted.

It is therefore ordered that said defendant, The City of Defiance, its attorneys, agents, officers and servants be, and they and each of them are hereby enjoined and restrained from in any manner interfering with, destroying or taking away, the whole or any part of the overhead bridges described in the petition or the approaches thereto.

This order to remain in force until the further order of the court herein, upon plaintiff giving an undertaking with surety to the satisfaction of the clerk of this court, in the sum of two thousand ($2,000) dollars, conditioned according to law. So done and ordered this 13th day of June, A. D. 1893.

JOHN J. MOORE,
HENRY W. SENEY,
Judges of the Circuit — of Ohio. Third Judicial Circuit.

In the Circuit Court of Defiance County, Ohio, October Term, A. D. 1893, to wit, October 21, 1893.

Journal 1, page 241.

THE WABASH RAILROAD COMPANY
vs.
THE CITY OF DEFIANCE. } No. 166.

Continued for want of time to try.

In the Circuit Court of Defiance County, Ohio, February Term, A. D. 1894, to wit, March 2d, 1894.

Journal 1, page 257.

THE WABASH RAILROAD COMPANY
vs.
THE CITY OF DEFIANCE. } No. 166.

On this 2d day of March, being the fourth judicial and the last day of the term, again came the parties by their attorneys
23 severally, and this cause having been heard on the pleadings and the evidence on a former day of this term, and after argument of counsel submitted to the court, and the court now being fully advised in the premises, do find the equities of the case with the defendant; and it is hereby ordered, adjudged and decreed that the injunction heretofore granted by this court herein be and the same is hereby dissolved, and that the plaintiff's petition be and the same hereby is dismissed at the plaintiff's costs of suit, and that the defendant recover its costs aforesaid against the plaintiff, in which costs are to be taxed the stenographer's fee of $10, for all which execution is hereby awarded against the plaintiff; and it is

further ordered that unless said costs be paid within ten days a mandate be sent to the court of common pleas of this county for execution.

And thereupon, on request of the plaintiff, the court finds that a Federal question was raised in the case on the final trial thereof by the plaintiff, both in its petition, to the effect that said ordinances of the said city of Defiance, if carried into effect, would be in contravention of the provisions of the Constitution of the United States, and especially of art. I, sec. 10, thereof, and also in argument by plaintiff's counsel, fully set forth in their brief and contended for by them, that said questions were necessarily involved in the decision of this case, and that the court decide the said Federal question and constitutional points against the contention of the plaintiff.

And thereupon came the plaintiff and filed its motion for a rehearing of this cause, which is overruled by the court; to which and to all of the said orders, judgment, decree and decisions of the court herein the said plaintiff duly excepted at the time, and still now here excepts, and prayed the court that a bill of exceptions be allowed, to be filed and made a part of the record of this case, but not spread at large on the journal of the court, all of which is hereby ordered on the day first herein named.

THE STATE OF OHIO, } ss:
Defiance County, }

I, J. S. Haller, clerk of the circuit court within and for said county, and in whose custody the files, journals and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the journal No. 1 of the proceedings of the circuit court within and for said county, and that said foregoing copy has been compared by me with
24 the original entry on said journal No. 1, pages 232, 233, 241 and 257, and that the same is a correct transcript thereof.

In testimony whereof, I do hereto subscribe my name officially and affix the seal of said court at the court-house in Defiance, in said county, this 24th day of March, A. D. 1894.

[SEAL.] J. S. HALLER, *Clerk.*

Motion for Rehearing (*Filed March* 2, 1894).

In the Circuit Court of Defiance County.

THE WABASH RAILROAD COMPANY }
vs.
THE CITY OF DEFIANCE. }

Now comes the said plaintiff and moves the court to vacate its order, decision and decree made herein and to grant a rehearing of this cause, for that:

1st. That the said order, decision and decree are not sustained by sufficient evidence and are contrary to the law.

2d. That the court erred in the law during the final hearing of this cause in excluding competent and relevant evidence offered by the plaintiff and in permitting the defendant to give in support of its defense incompetent and irrelevant evidence, as well as in numerous other orders and rulings made against the plaintiff, all of which were excepted to at the time.

ALEX. L. SMITH,
HENRY NEWBEGIN.
Attorneys for Plaintiff.

Bill of Exceptions (*Filed March* 2, 1894).

In the Circuit Court of Defiance County.

THE WABASH RAILWAY COMPANY
vs.
THE CITY OF DEFIANCE. } No. 166.

Be it remembered that, at the February term, A. D. 1894, this cause came on for final hearing in the said circuit court, on
25 appeal from the court of common pleas of said county. And the plaintiff, to maintain the issues on its part, offered and gave in evidence to the court the following testimony and evidence, to wit:

Plaintiff's Witnesses.

The complainant, to sustain the issues on *his* part, called as a witness—

Mr. E. K. WOODWARD, who being first duly sworn, testified as follows:

Examination by Mr. NEWBEGIN:

Q. State your residence and occupation.
A. I am a resident engineer and I reside at Peru, Indiana. I am the engineer of the Eastern division of the Wabash road.
Q. How long have you been so employed?
A. Since July, 1888.
Q. What experience in railway business have you had?
A. I have had experience on railroad construction.
Q. For what period, and where?
A. Before that time, since 1882. I have worked on various roads on construction, the Iron Mountain, Missouri Pacific, and other smaller roads.
Q. You may state whether or not you are familiar with the railway crossings in the city of Defiance over the Wabash track at North Clinton street and Ralston avenue.
A. Yes, sir; I am.
Q. Have you made any especial measurement of the surface of the locality, and height of approach to the crossing to that point?

A. I have made a survey of the location and height of both of the approaches.

Q. When?

A. In the winter of 1892–1893; I don't know just the date.

Q. Prior to the hearing of this case in the court below?

A. Yes, sir.

Q. Did you make a profile showing?

A. Yes, sir.

Q. Have you got that with you?

A. Yes, sir.

(It is understood the witness in the deposition refers to the same profile.) (Ex. N.)

Q. Look at the paper I now hand you, and state what it is.

A. It is a plat showing the location of the railroad crossing and approaches at North Clinton street, Ralston avenue, and also a profile of each of the railroad crossings and approaches at each place.

26 Q. Made by yourself?

A. Yes, sir.

Q. Now you may state whether it shows correctly the location and also the profile of the approaches.

A. It does.

Q. Now I wish you would explain to the court the sketch on which this profile is made, and perhaps you can explain it better by stepping up here. I call your attention to the horizontal scale on which you prepared this profile.

A. The horizontal scale is the same in each, one inch in forty feet, these heavy marks — that is two inches and a half in one hundred feet; the circular scale is one inch and three feet.

Q. I call your attention, Mr. Woodward, to the blue lines on the profile as prepared by you. Please state to the court what they represent.

A. They represent the grade as proposed by the recent ordinances of the city.

Q. The ordinances of '93?

A. Yes, sir.

Q. And they are made upon the same circular and horizontal scale as the profile of the crossing?

A. The same scale.

Q. Will you kindly look at this tracing I now hand you, and state to the court what that is?

A. That is the same profile as the other of Ralston avenue and Clinton street; the circular and horizontal scales are the same. (Ex. M.)

Q. This shows correctly the actual grade of the old status and the new improvement and the true proportions?

A. Yes, sir.

Q. Of the surface of the earth there?

A. Yes, sir.

Q. Have you compared this with the original, to know it is correct?

A. Yes, sir.

Q. You will testify it is correct?

A. There is one place this could be lowered here, this grade line should be a little lower here.

Q. It is substantially correct?

A. Yes, sir.

Q. Please state when you first became acquainted by a personal inspection with the bridges over the Wabash tracks at these roads.

A. I think the first I made a personal inspection was the time I made the survey for this plat: I made a thorough inspection.

Q. Had you been familiar with the bridges before that time?

A. Yes, sir; I knew they were there.

Q. What is the distance in the clear between the tops of the rails and the bottoms of these bridges?

A. The one at Ralston avenue is twenty-one feet, the one at North Clinton street is twenty-one feet and three inches.

27 Q. What is the width of the roadway of these bridges?

A. Eighteen feet.

Q. And what is the width of the sidewalk?

A. Eight feet.

Q. What sidewalks are there on these bridges?

Objection by Mr. Hubbard.

Mr. SMITH (to the court): We are going to show that we complied with the provisions of this first ordinance.

Objection overruled; exception. (Exception.)

Q. What sidewalks are there upon these bridges?

A. A sidewalk of eight feet in width on each side.

Q. What kind?

A. A good substantial sidewalk.

Q. How is it protected at the sides?

A. It has a railing both sides of each walk.

Q. What kind of railing?

A. Firm posts and boards.

Q. You may state how the sidewalks are brought to the level as they approach.

A. There is one on the west side of Ralston avenue and they are brought down to the level both by inclined sidewalks and by steps and in other places they are inclined to bring it to the natural level.

Q. You may state what is the grade of the approaches to these bridges.

A. Well, sir, the grade to the bridges varies.

Q. What is the maximum?

A. A little less than five feet in a hundred; that is only one point on the farther side of Ralston avenue.

Q. Making it how many inches to the foot?

A. An inch and a quarter to the foot.

Q. That is the maximum?

A. Yes, sir; not quite one foot in twenty; about forty-eight feet in one hundred.

Q. Prior to the partial destruction of one of these bridges what was the character of the construction of the bridges as to their durability, solidity and convenience?

A. They were very good bridges, they were solid and well constructed.

Q. What was the character of the approaches to the bridges?

A. The approaches, in what respect?

Q. How were they constructed?

A. They were constructed of earth, and I don't remember whether there was some stone on one of them; I don't remember about that.

Q. In what state of repair have they been during the time you have been acquainted with these approaches?

A. In a good state except just at the end of the bridge.

Q. What is there as to that?

A. There is a little raise there of about a half a foot that
28 should not have been there; that is to say the grade of the approach was filled up higher than it was intended.

Q. You were not in the employ of the plaintiff company or the receiver at the time these bridges were raised to their present height?

A. No, sir.

Q. You may state whether there has been any change made in the grade of the railway track or the approaches since you became familiar with the bridges.

A. There is no change been made there to my knowledge.

Q. You may state whether you are familiar with the ordinances of the city of Defiance passed in 1893, for the reduction of these crossings to grade.

A. No, I know the ordinance was passed but I don't remember what grade there was at that time.

Q. You made a survey with reference to that grade?

A. Yes, sir.

Q. You made your plat with reference to it?

A. Yes, sir.

Q. You were then familiar with it?

A. Yes, sir.

Q. You may state what in your judgment would be the effect upon the railway business, and the relations of the railroad to the public, of the carrying into effect of these ordinances by making a grade crossing at this point.

Objection; objection sustained; exception. (Exception.)

Mr. NEWBEGIN: It is charged in the petition that this ordinance is passed for the sole purpose and intent of doing away with these overhead bridge crossings, and not for the improvement of the street. Under that guise they undertook to bring about, indirectly, what they could not do, and did not seek to do directly; that is our charge, that the ordinance if carried into effect is oppressive.

Mr. SMITH: We propose to show the exercise of the power in this case, that the exercise of that power was an abuse of power and was oppressive, and we propose to show that from the nature of the ground in this case such is the fact.

The COURT: The nature of the ground is not your question.

Q. What, in your judgment, would be the effect of the carrying into execution of the ordinances establishing grade crossings at these points, upon the danger to the public traveling over the railroad or on the roadway?

Objection; objection sustained; exception. (Exception.)

Mr. SMITH (to the court): We expect to show by the answer
29 of the witness to this question, that in his judgment it would be the effect of the execution of these ordinances to vastly increase the danger to life and property of the public traveling on the railroad, and also to those traveling upon the highways in question.

Q. You may state what is the grade of the railway track at the crossings of these roads there; is it on a grade, and if so, how much?

A. It is on a grade running down toward the river toward the west.

Q. How much of a grade?

A. I could not tell just now what it is, about twenty-six feet to the mile.

Q. What grade is that?

A. The grade of the road going west, of about twenty-six feet to the mile.

Mr. SMITH:

Q. What would you say of the situation of the railroad track as to being straight or otherwise at that point?

A. It is about a four-degree curve, commencing west of the approach and running toward the river.

Q. What is the formation of the ground at the point where the railroad tracks cross these streets?

A. It is in a cut.

Q. How deep a cut?

A. Eleven or twelve feet.

Q. How far is the natural surface of the ground above the level of the railroad track at the points of these crossings?

A. About twelve feet.

Q. Is there any difference as between these two crossings in regard to the extent to which the ground on either side of the track would cut off the view or sound of immediately approaching trains?

A. There might be a little bit in favor of the Clinton-street crossing.

Q. Why?

A. Because it is further from the curve; it would amount to very little.

Q. What is the fact as to the obstruction of the view of persons on the highway of the approach of trains?

A. Well, if you were down in the cut you could not see a train.

Mr. NEWBEGIN:

Q. Would it obstruct the sound of the train?

A. It would to a certain extent.

Mr. SMITH:

Q. What in your judgment is the least space that can be safely allowed under the present conditions of railroading, between the track and the floor beams of an overhead bridge crossing?

Objection.

The COURT: Let him state the facts, the court will draw conclusions.

Exception by plaintiff. (Exception.)

Q. You may state what the height of the railroad cars—what it is of cars which are required to pass under these bridges?

A. I don't know what the height of the highest cars is; they run from eleven and twelve feet and some of them are higher than that.

Q. You don't know?

A. I don't know the height of the furniture cars.

Q. They are higher than that?

A. I think so.

Q. From the survey that you made, with reference to the cutting down of the grade of these streets, according to the ordinances in 1893, how far would the approaches be below the surface of the ground, from the bridge back to a point where the downgrade begins; that is, if reduced to grade under the provisions of the ordinances, how deep would the grade crossing be below the surface of the ground?

A. The deepest part of the grade crossings would be about twelve—eleven and one-half feet.

Q. What is the grade of the approaches, according to these ordinances?

A. I don't know. I don't remember what they are just now; I had them at the time, but I have forgotten what they are now.

Q. How much of an incline would it be?

A. I have forgotten what they were.

Mr. NEWBEGIN:

Q. Does it appear there?

A. No, not in figures; it shows on this plat about four feet and a half in a hundred; that is as near as I can get to it.

Q. Tell the court how wide a space there would be if the improvement were carried into effect—how wide a space there would be—level space, at the grade crossing.

A. The ordinance provides for fifty feet.

Q. Twenty-five feet from the center of the track?
A. Yes, sir.

Mr. SMITH:

Q. What is the width of the right of way at that point?
A. One hundred feet.

No cross-examination.

The COURT (to Mr. Hubbard, defendant's attorney): Will you dispute what he has testified to?

Mr. HUBBARD (to the court): Only possibly as to some of the heights. The height of the surface, as to the height of the natural surface of the ground, above the track of the railroad, I may dispute.

And further, to sustain the issues on its part, the complainant offered as a witness—

Mr. E. A. GOULD, who, being first duly sworn, testified as follows:

31 Examination by Mr. NEWBEGIN:

Q. Please state your business.
A. I am the superintendent of the Eastern division of the Wabash road.
Q. What is the extent of your line?
A. About six hundred and thirty miles.
Q. What is your experience in railroad business, the operation of it or otherwise?
A. I have been in the railroad service about twenty-four and a half years. I began as telegraph operator and went through the various grades, trainmaster, assistant superintendent, master of transportation and superintendent.
Q. How long have you been superintendent here?
A. I began here November 10, 1889, a little over four years ago.
Q. Are you acquainted with the locality here, north of the river, at the so-called crossing of your track over the Brunnersburg road and Holgate pike, otherwise called Ralston avenue and North Clinton street?
A. Yes, sir; I know where that is.
Q. Have you made any special examination of that locality?
A. Yes, sir, I have; several times a year.
Q. Are you familiar with this plat?
A. The marks, you know, I could not tell much about that; it looks something like the locality.
Q. Do you know the height of the bridges overhead—the bridges there in the clear—from the lower timber part of the timbers of the bridge to the top of the track?

Mr. HUBBARD (to the court): We will take the statement of the last witness.

Mr. NEWBEGIN (to the witness):

Q. Can you state to the court whether or not there is a grade in

the railroad at these crossings? Is the railroad track at a grade or on a level?

Mr. HUBBARD: We won't dispute the last witness on that.

The WITNESS: It is on a downgrade to the west.

Q. And how much?

A. About twenty-six feet to the mile.

Q. And how is it as to the curvature of the tracks there?

A. There is a curve about a short distance west of the bridges three or four hundred feet.

Q. State to the court whether there is more than one track or not at those places.

A. No; only one track.

Q. What is the curvature?

A. I could not tell the degree, I think it is about four degrees.

32 Q. How deep is the cut there if at all at the crossing?

A. I should judge about twelve feet.

Q. Is the curve sufficient or not to obscure the sight of trains coming in from the north or the northeast?

A. The track is on a tangent.

Q. I mean if it was reduced to grade; if the provisions of this ordinance were carried out to reduce your present crossing to a grade crossing, how would it be with persons making that crossing on the public highway, if the curve was so as to obscure the sight of trains?

A. It would obscure the sight of the trains very much, on account of the cut of the track.

Q. How as to the sound of the whistles, signals and bell?

A. It would obscure the sound to the extent of the cut to a considerable difference.

Q. How deep would the cut be if reduced to grade; I mean the cut of the streets?

A. At the track?

Q. Right at the grade crossing.

A. About twelve feet.

Q. They would both be about alike, or is one more than the other?

A. I could not tell you as to that, as I never gave the matter very much study. I could not tell you how much it would be.

Q. How high above the track are the highest cars which you now take into you- trains?

Objection by Mr. Hubbard.

A. Well, do you mean our own cars?

Q. Any the law obligates you to take; any cars.

A. We won't take any car over sixteen feet high; the cars at that height are very scarce.

Q. Do you occasionally take cars into your train sixteen feet high?

A. We are allowed to.

Q. Do you find any you do take in?

A. I could not say as to that; I don't see all the cars that go over the road.

Q. Can you tell how high the refrigerator and furniture and that class of cars are now constructed?

A. Furniture cars are about fourteen and a half feet.

Q. How are they as compared with the refrigerator?

A. Refrigerator cars are not that high.

Q. You have cars you take into trains fourteen and a half feet?

A. Yes, sir.

Q. How tall are the men you employ?

A. We don't limit them.

Q. Are some of them six feet?

A. Yes, sir; some are six feet two.

33 Q. You have recently built a new bridge over here, across the Maumee?

A. Yes, sir.

Q. What is the height in the clear of that above the track?

Objection; objection sustained.

Q. Well, state whether by any contrivance, any reasonable contrivance, consistent with operating your road by running trains over it, you could make those grade crossings if the ordinances were carried into effect, safe to the traveling public, and safe to your men operating the trains and passengers in them.

Objection; objection sustained; exception. (Exception.)

The COURT:

Q. We don't think it proves anything in the case.

(Exception.)

Mr. NEWBEGIN (to the court): I propose to prove by this witness—if the witness is not qualified——

The COURT: He is qualified.

Mr. NEWBEGIN (to the court): Then I say we propose to show by this witness, the superintendent of the company, that it would be impossible by gates or by watchmen, considering the steep downgrade, and considering the sharp curves at both of these crossings with the utmost care to prevent continuous accidents, judging from his past experience in railroad management.

Mr. SMITH (to the witness):

Q. Were you in the employ of McNulta as receiver of the Wabash road in 1887 or 1888?

A. No, sir; I was not on this line.

Q. You were on the west line?

Cross-examination by Mr. HUBBARD:

Q. I understand you to speak about these crossings being, at least one of them, on a tangent on a straight line; was I correct?

A. I think you understood me, they are both on a straight line.

Q. Where is the tangent point of the curve?
A. I think about three or four hundred feet of the curve to these approaches——
Q. Where does the tangent begin?
A. At the point where it strikes the curve.

Mr. NEWBEGIN (to the court): I understood you would not listen to any testimony as to the dangerous character of those crossings?

The COURT (to Mr. Newbegin): That has not been the
34 ruling — we sustained the objection to the question; you asked him to give his opinion as to whether they could protect them by any appliances.

Q. You may state whether, if these crossings were reduced to grade, they would be or not dangerous to the lives and limbs of the public making them and to your trainmen and passengers.

Objection; objection sustained; exception. (Exception.)
Mr. NEWBEGIN: I propose to prove, if the court please, that the crossings, if the provisions of the ordinance were carried into effect to make them grade crossings, where they now exist, would be exceedingly dangerous to the lives and limbs of passengers attempting to make them on the public highways; and on account of the liability to accidents there by their trains meeting with obstacles on the track, that it would also be exceedingly dangerous to trainmen in operating them and to passengers in their passenger cars.

And further to sustain the issues on its part, the plaintiff called as a witness—

WILLIAM S. DANES, who, being first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. State your name, residence and occupation.
A. My name is William S. Danes; my residence Peru, Indiana, and my occupation, superintendent of bridges and buildings.
Q. For what road?
A. For the Wabash.
Q. State whether or not you were in the employ of General McNulta, as receiver of the Wabash, in 1887 and 1888?
A. Yes, sir.
Q. How long have you been in the employ of the Wabash road, or the receiver of the Wabash road?
A. About thirteen years.
Q. What, if anything, did you have to do with the change that was made in the elevation of the approaches at the Brunnersberg road and Holgate pike in the city of Defiance, in the early part of 1888?
A. I had charge of the erection of them.
Q. Did you personally superintend the work?
A. Yes, sir.
Q. That was during the McNulta receivership?
A. Yes, sir.

Q. Now, were you then, and are you now, familiar with
35 the terms of the ordinance of the city council of Defiance, of December, 1887?

A. Yes, sir.

Q. What would you say as to whether the work of the making the change made in 1888, the early part, was done in conformity with the provisions of that ordinance, as to grade, dimensions, distance and character of the work?

Objection; objection sustained; exception.

Q. You may state when the work of making that change was undertaken.

A. We commenced in January, 1888.

Q. When was it finished?

A. February, 1888.

Q. What was the character of the approaches over the crossing before that change was made?

A. Well, there was a frame trestle bridge on the same principle as the bridges are now.

Q. How high above the level of those tracks were those bridges?

A. Sixteen feet and ten inches, I think.

Q. And what was the grade of the approaches to those bridges?

A. The grade?

Q. On the bridge; the approaches to the bridge?

A. I don't remember just what it was.

Q. Now, what is the character of the construction of the bridges which you constructed in the early part of 1888, when the change was made, as to being substantial or otherwise?

A. They are quite substantial.

Q. Built of what?

A. Built of 12 x 12 timber; three-inch oak floor on them, and two-inch plank sidewalk.

Q. What is the width of the roadway?

A. Eighteen feet.

Q. Was the character of the sidewalk good and substantial?

A. Yes, sir.

Q. How wide?

A. Eight feet.

Q. On each side both bridges?

A. Yes, sir.

Q. What sort of railing are they provided with?

A. A good, substantial rail, with boards on each side, 2 x 4 on the top of the railing.

Q. What was the height of the bridges in the clear between the tops of the rail and the bottom of the floor of the bridges?

A. Twenty-one feet.

Q. The approaches to the bridge being sufficient and of good construction, tell what they were?

A. The first one put up there we put up steps; they were taken down and inclined approaches built on each side.

Q. I am talking about the roadway.

A. Cinders were put in there and stone was put in there, and they were good substantial approaches.

36 Q. What was the grade of the approaches, the maximum grade?

—. I don't know just what it was; on the approach it was about three-quarters of an inch; I don't know as to the bridges.

Q. Well, you have testified as to the approaches, about what it was?

A. There would be about an inch to the foot.

Q. Now as to the sidewalks, what was done to bring them to the level of the street or the sidewalks on each side?

A. Well, in the first place we put steps up there to bring them down to the sidewalk; afterward they were taken down and we built inclined sidewalks on each side.

Q. Now you may state whether or not any change was made in the level of the tracks, bridges or approaches after you had finished the work of raising the bridges to their present level?

A. No, sir; there has been no change made.

Q. And in what state of repair were the bridges kept and the approaches thereto, after the change was made and up to the time of the passage of the ordinance in February, 1893?

A. They had been kept in a good state of repair.

Q. What has been your work during the period from the time you supervised the change in 1888 to the present time?

A. I was foreman of bridges after that until July 10, 1891; since that time I have been superintendent of bridges.

Q. What has been your duty with reference to these bridges?

A. I have had charge of them, seeing to fixing them up and seeing they were kept in repair.

Q. Who paid, if you know, for the costs of the construction of this work in 1888?

A. The Wasbash railroad.

Q. The receiver?

A. Yes, sir.

Q. Do you know how much those bridges cost—the work of raising them from their former level to the present?

A. About $2,456.

Q. Of what was that made up chiefly?

A. Of material and labor.

Q. Who kept an account of it?

A. The clerk at Andrews; of course, the foreman keeps charge of the work and reports it.

Q. You were then the foreman?

A. Yes, sir.

Q. The account was made up on reports made by you at the time?

A. Yes, sir.

Q. You testified the height of the former bridge was sixteen feet and ten inches in the clear. Do you mean the height

37 of the old bridge you removed to make way for the present one?

A. Yes, sir.

Mr. NEWBEGIN:

Q. That has been renewed once?
A. No; that was before I came here; the bridge I took down was the one that was here.
Q. The ones you took down were sixteen feet and four inches in the clear?
A. Yes, sir.

Cross-examination by Mr. HUBBARD:

Q. You say you built sidewalks on both bridges?
A. Yes, sir.
Q. Was there any sidewalk at all on but one side of the Brunnersberg bridge, the new bridge?
A. Yes, sir; sidewalks on both sides.
Q. Of the bridge on the Brunnersberg road?
A. Yes, sir; I am very sure.
Q. Yes, sir?
A. Yes, sir.
Q. Was there at the time you built them?
A. No, sir; not at the time I built them.
Q. When you rebuilt the bridge on the Brunnersberg road did you put a sidewalk on both sides of the approach?
A. Yes, sir.
Q. How is it as to the floor of these bridges being upon a level from one end to the other?
A. They are not level.
Q. If you can, state what the incline was.
A. Three-fourths of an inch to the foot.

And further to sustain the issues on its part the plaintiff recalled as a witness—
Mr. E. K. WOODWARD, who, being first duly sworn, testified as follows:

Examination by Mr. SMITH:

Q. I understand you wish to make a correction of your former testimony in reference to the depth of the cut?
A. The depth of the cut runs from eleven up to twelve feet, eleven and eight-tenths to twelve feet. Twelve feet is the highest, and eleven feet is the lowest; I believe I stated twelve feet clear.

Cross-examination by Mr. HUBBARD:

Q. That is from the surface of the ground at the edge of the cut?
A. That is from the rail.
38 Q. From the rail up to the level at the surface of the ground at the edge of the cut?
A. Yes, sir.

And further to sustain the issues on its part the plaintiff called as a witness—

Mr. EDWIN PHELPS, who, being first duly sworn, testified as follows:

Examination by Mr. NEWBEGIN:

Q. State how long you have resided in Defiance?

A. I came here in 1834, and I have resided here ever since, with the exception of about six years at Granville.

Q. Are you familiar with the locality of the so-called Brunersberg road and Holgate pike, where they cross the Wabash railroad track?

A. I am.

Q. State how long you have been acquainted with the Brunersberg road now called Ralston avenue; how long it has been open for travel to the public, if you know.

A. Well, it was open so you could go there with an ox sled when I came here.

Q. That was in——

A. 1834.

Q. And has it been continuously, from that time to this, a public highway?

A. Yes, sir.

Q. State if you know, whether it is a county, State, or what other kind of road.

Objection.

The COURT: It is admitted it was a county road, and it is now in the limits of the city of Defiance; it is admitted just as you charge it in the pleadings.

Q. I ask him, if he knows, whether that is a State or county road, or what kind of public highway it is?

A. It is called the Bellefontaine and Indiana State road from Bellefontaine, in Logan county, to the State line of Indiana.

Q. State how long Holgate pike has been open, if you know. It is now called North Clinton street, I believe, by some.

A. Well, I don't recollect just when it was opened, there has been a road there before the railroad was built.

Q. When was that?

A. Well, it was built in 1853–'54; that part of it there was built in 1853–'54.

Q. What kind of public highway was that?

A. County.

Q. State what the approach is there, going north to the
39 intersection of this street; a State, county or what kind of highway.

A. It is kept up by the county.

Q. Well, what kind of a highway was that called when you first came here?

A. Well, that was called the Bellefontaine road.

Q. The continuation of the Brunersberg road?

A. Yes, sir.

Q. State whether you know the facts of the building of the grading and construction, laying track, etc., of the railroad over those public highways or under them?

A. Yes, sir. I was here when it was built; did not help build on that side; I helped build on the other side.

Q. Were you a contractor?

A. For eleven miles.

Q. The road was open for travel in 1855, and built in 1854?

A. The railroad was, the bridges were built in 1854.

Q. What kind of crossings were made at those two public highways across the track, in 1854, or 1855, when they were first built?

A. They were two bridges built over there.

Q. And how have they been, both of those public highways over the railroad track, from that time to this? Describe the changes, if any?

A. Well, the bridge has been raised, made higher since that, since it was built.

The COURT: There is no dispute about that.

The WITNESS: They were changed a little I think, about 1876, or 1877; I don't recollect when they were built, but they were raised considerably higher.

Q. State now, if you know, whether or not the highways there on either side of either street are paved or not, or are they common mud roads?

A. Common mud roads.

Q. Is there a sidewalk at either street with a curb to it at either crossing?

A. Well, there is a plank sidewalk.

Q. Is there any curb on the outside of the sidewalk?

A. I think there is a railing.

Q. Is there a curb, a curbstone?

A. I think not.

Q. At either crossing.

Q. State whether or not there is a rise there where the road, the railroad, comes toward the Maumee River bridge; is there any downgrade?

Mr. HUBBARD (to the court): We don't controvert it—we don't controvert the testimony of your witnesses on those points.

Q. State whether or not the curve in the track there and
40 the depth of the cut at both crossings is substantially the same as it was when the road was constructed, and has so remained to this time?

A. I think it is the same; they may have lowered it a little.

Q. Lowered what?

A. The grade; I think they lowered it a little after they first put it down. But I don't know whether they built it up as much as they took out or not; I know they lowered it.

Cross-examination by Mr. HUBBARD:

Q. About when was it lowered?

A. Well, it was when they were ballasting, perhaps the next year or the year after the road was built; they took out earth there, lowered it down and took it across toward the depot. I saw the station agent at the time.

Q. Well, since that they have been ballasting the road from time to time with stone?

A. Yes, sir.

Q. And in ballasting it they have raised the track considerably?

A. Yes, sir, perhaps some.

Q. In 1876, when the bridges were first replaced, they were raised at that time?

A. My impression is they were raised about a foot.

Q. And those bridges raised a foot, remained there until the bridges were put there in 1888?

A. Until the present ones were put there.

Q. Both of these bridges and the roads they are on now, are within the territory limits of the city of Defiance?

A. Yes, sir.

Mr. NEWBEGIN:

Q. You may state what the character of those crossings would be if reduced to grade, as to being dangerous to the lives and limbs of the public making them and of persons operating trains and of passengers on them?

Objection; objection sustained, exception.

Mr. NEWBEGIN (to the court): We expect to prove by this witness, if the court please, the same we offered to prove by Mr. Gould as to the dangerous character of these crossings if reduced to grade, that they would be exceedingly dangerous to the lives and limbs of the public, and also on account of liability of accident by obstructions being on the track, to the trainmen and to the passengers on the trains, resulting in liability for such accident to our passengers.

And further to sustain the issues on its part the plaintiff called as a witness—

41 Mr. BRICE HILTON, who, being first duly sworn, testified as follows:

Examination by Mr. NEWBEGIN:

Q. How long have you resided in Defiance county?

A. A little over seventy-one years.

Q. Where did you live and where do you now live?

A. My father settled when I was a boy up here on the south bank of the Maumee river, about two miles from here; I lived there about six years and in Defiance four years and since that I have resided at Brunersberg down here.

Q. How far from Defiance?

A. Two miles.

Q. On the Brunersberg road?

A. Yes, sir.

Q. Where did you come from to Defiance county?

A. From Miami county.

Q. I thought you came from Maine?

A. Yes, sir; I came from Maine; my father moved from Maine.

Q. Well, now, coming to town during that seventy years, what road have you taken?

A. I was here before there was any road; just took out the first survey of the land; but the principal road from here to Brunersberg was a State road; it started at Delaware, Ohio, came through Defiance here, and went through Brunersberg to the Indiana State line.

Q. Is that called the Brunersberg road?

A. It was called the Bellefontaine State road; that is what it is called; it goes by that name, and has ever since.

Q. It is now known as Ralston avenue sometimes?

A. Well, I don't know, I never have known it as that.

Q. In coming to town where, if at all, do you cross the Wabash railroad track?

A. Within the corporation out here.

Q. At Ralston's?

A. Yes, sir; between here and Ralston's.

Q. Do you know when the railroad was built?

A. Yes, sir; I think I do.

Q. Tell the court whether that crossing has been there substantially as it is now since the railroad was built—what has been the kind of crossing overhead or underneath the grade from that time?

A. The road raised the grade perhaps three feet?

Q. When was that?

A. Some eight or ten years ago.

Q. How was it before that time?

A. It has always been a good bridge there; I have never
42 heard any complaint of the bridge—no complaint of getting off or onto it on this side.

Q. What is the matter with the other side?

Objection.

A. In a wet time the complaint was the grade was too high, too steep.

Q. State if you know where the Holgate pike crosses the railroad track.

A. It crosses about sixteen or eighteen rods east of where the bridge is on the Ralston road, as you call it.

Q. How long had that been open for travel?

A. Forty years or such a matter, fifty maybe.

Q. What is that; a county or State road? What kind of highway?

A. I think it was a county road; I am not sure.

Cross-examination by Mr. HUBBARD:

Q. Both these roads were there long before the railroad was built—the Bellefontaine road and Holgate pike were there and open and used by the public long before the building of the railroad?
A. Yes, sir; both of them were used before the railroad was built.

And further to sustain the issues on its part, the plaintiff called as a witness—
ISAAC CORWIN, who, being first duly sworn, testified as follows:

Examination by Mr. NEWBEGIN:

Q. How long have you lived in Defiance?
A. Since 1850.
Q. Which side of the river?
A. The north side.
Q. How near the vicinity of the railroad crossing or highway crossing of the Brunersberg road and North Clinton street, over the Wabash road?
A. I could not say; I should say forty rods.
Q. State whether the highways are paved where they made those crossings, or are they ordinary roads?
A. They are paved now, I believe.
Q. Are paved?
A. To each side with gravel.
Q. An ordinary gravel road?
A. Yes, sir.
Q. What kind of sidewalks?
A. Wooden sidewalks—plank.
Q. On one or both sides of the highway across the
43 bridge?
A. One of them, the Holgate pike, has a sidewalk on each side; the other one has only one sidewalk.
Q. How was it before it was partially torn away this last spring?
A. That is when I had reference to.

Mr. NEWBEGIN (to the court): I offer a certified copy of the ordinances of the then village of Defiance, passed in 1876; this is the ordinance of 1876, when the company built a sidewalk on what is now North Clinton street, upon the condition that it should ever after be kept up by the village.
The COURT (to Mr. Newbegin): The ordinance of 1876.
Mr. NEWBEGIN (to the court): We will read it to show there was a consideration for the contract of 1887.

Objection by defendant.

The COURT: It is in evidence and you may mark it "Exhibit A." (Ordinance of 1876, passed September 10th.)

Exception by defendant.
Said ordinance was offered in evidence and marked as directed by the court, and is hereby made a part of this bill of exceptions.

PART OF BILL OF EXCEPTIONS—"EXHIBIT A," ORDINANCE OF 1876.

An Ordinance.

SECTION 1. Be it ordained by the council of the incorporated village of Defiance: That, whereas, said village of Defiance is desirous of erecting and maintaining a foot-bridge on Holgate pike, across the Toledo, Wabash and Western railway, and application has by said council been made to the Toledo, Wabash and Western Railway Company for permission to do the same, which permission has by said company been granted upon the conditions following, to wit:

1st. That said bridge shall be erected to join the present highway bridge of said company, over said Holgate pike.

2d. That there shall be exactly the same clearance between the top of the rails of the said railway track and the bottom of the stringers of the said foot-bridge, so to be built, as there now exists between the said rails and the said highway bridge.

3d. That the structure of the said foot-bridge shall be built and erected in a substantial and workmanlike manner in every respect, and of timber wholly of sufficient and proper size and strength. 44

4th. And that the said village of Defiance shall forever keep and maintain said foot-bridge in safe condition and good repair, and at its (said village's) own cost and expense.

5th. That the construction and maintenance of said foot-bridge, shall be subject to the inspection and approval of the engineer of the Toledo, Wabash — Western Railway Company, and shall be built and renewed and repaired from time to time, as directed by said engineer, at the expense of the said village of Defiance, and that the said village will be forever and absolutely responsible for the safe repair and maintenance of said foot-bridge.

SECTION 2. That the council on the part and in behalf of the incorporated village, do hereby accept the said conditions and agree that the said village of Defiance shall forever conform to and abide by, all and singular, the same, or so long as it shall desire to keep and use or have a foot bridge or walk across said railway at said Holgate pike.

SECTION 3. Be it further ordained by the council of the said incorporated village of Defiance, That the said village forthwith construct the said foot-bridge in the manner and on the conditions hereinbefore set forth.

[SEAL.] (Signed) JOHN W. SLOUGH, *Mayor.*

Attest: ELMER WHITE, *Clerk.*

I, J. J. Malley, clerk of the city of Defiance, do hereby certify that the above ordinance is a true copy taken from the records of the village proceedings of meeting held Sept. 10th, 1876.

J. J. MALLEY, *City Clerk.*

Defiance, May 17, '93.

Mr. NEWBEGIN (to the court): I propose to read in evidence a certified copy of the ordinance of 1887, under which these bridges were raised.

The COURT: That is copied in the pleading.

Objection by defendant to the introduction of the ordinance; objection overruled; exception by defendant.

Said copy of ordinance is hereunto annexed marked "Exhibit B," and hereby made a part of this bill of exceptions.

45 PART OF BILL OF EXCEPTIONS—"EXHIBIT B," ORDINANCE OF 1887.

Regular meeting of the city council. Council chamber, December 20, 1887.

Council called to order by President Miller.

Members present: Bonn, Kehnast, Miller, Marshall, Otto, Tennyson, Ziegler—7.

An Ordinance

Permitting the Wabash, St. Louis & Pacific railway to construct bridges at Holgate pike and Brunersburg road.

Be it ordained, by the council of the city of Defiance, Ohio:

SECTION 1. That the Wabash, St. Louis & Pacific Railway Company is hereby authorized to erect new bridges over and across the track of the railway of the said company where the same crosses the public streets in the Third ward of said city, known as the Brunersburg road and Holgate pike. Provided, said bridges shall be of good and substantial construction, placed in the center of said streets, be eighteen feet wide roadway, with good and substantial sidewalk eight feet wide on each side of each of the said bridges with proper railings on each side of the said walks. Said bridge and sidewalks to be at all times kept in good order and repair by said company. And said railway company is hereby further authorized to construct each of the said bridges of sufficient height to give a distance of twenty-one feet in the clear between the top of the rail of the said railway at its present grade and the bottom of the floor beams of said bridges.

Provided always, that company shall provide and construct good and sufficient approaches and grades to each of said bridges and extend the same to sufficient distance to give a grade of not to exceed one and one-fourth inches to the foot, and to conform to the width of the present street; said grade to be made firm and solid, by either stone or gravel, at the option of the said company;

Provided, that if gravel be used, said city will permit it to be taken from the gravel bed without charges, and to construct and to keep in constant repair, good and proper approaches to said sidewalk, and brought to the level of the present walk by broad, safe steps, where the grade would be too great for a safe incline; all to

be done to the approval of the council of said city, and all to
46 be kept in repair to the extent of the said company's right of way, at all times, by said company.

SEC. 2. The work of the entering upon the construction of said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as — either of said bridges.

SEC. 3. This ordinance shall take effect and be in force from and after its passage and due publication.

Done at the council chamber in regular session, this 20th day of Dec., 1887.

Attest: JAS. A. KITCHEL, *City Clerk.*

On motion the rules *was* suspended for the purpose of putting the foregoing ordinance upon its final passage by the following votes:

Ayes—Bonn, Kehnast, Marshall, Miller, Otto, Tennyson and Ziegler—7.

Nays—None.

Being then put upon its final passage the ordinance was adopted by the same vote.

I, Jas. A. Kitchel, do hereby certify that the foregoing ordinance received due publication in the Defiance Democrat, a paper of general circulation in said city and county.

JAS. A. KITCHEL, *City Clerk.*

I, J. J. Malley, clerk of the city of Defiance, Ohio, do hereby certify that above and foregoing is a true copy of the records as found in the Journal "B," pages 68 and 69, records of the city of Defiance, Ohio.

[SEAL.] J. J. MALLEY, *City Clerk.*

Mr. NEWBEGIN (to the court): I propose to read in evidence a certified copy of a resolution passed in 1882, by the city requiring us to build overhead crossings, requiring this railroad company to build overhead crossings at High street, which is north of the river and the next street this side of Ralston avenue.

Objected to as irrelevant; objection sustained; exception.

Said copy is hereunto annexed marked "Exhibit C," and hereby made a part of this bill of exceptions.

47 Mr. NEWBEGIN (to the court): My purpose in offering to read this is to show the policy of this city down to 1882, and that this resolution is in fact still in force.

I propose to show that the policy of this city ever since that time has been to require overhead crossings where they were at grade. I further offer to show that the policy of the city has been to require overhead crossings to be made by these plaintiffs in the very vicinity of these two streets where they now seek to require us to have a grade crossing, and I offer further to prove in connection with it that it is the next street southwest of Ralston avenue, North Defiance.

PART OF BILL OF EXCEPTIONS—"EXHIBIT C," RESOLUTION OF 1882.

COUNCIL CHAMBER, DEFIANCE, OHIO, *Nov.* 7, 1882.

Regular meeting of city council.

Members present: Houghton, Southworth, Truyer, Halston, Kohlo, Miller and President Bechel. Absent: Myers.

A Resolution

To require the Wabash, Saint Louis and Pacific Railroad Company to bridge High street, in North Defiance.

Be it resolved, by the council of the city of Defiance, Ohio, That, 1st, in the opinion of the council the safety of the travel and lives of citizens it is necessary that a bridge be built on High street over the Wabash, St. Louis and Pacific railroad. It is therefore and hereby

Resolved, That the said Wabash, St. Louis & Pacific Railroad Company be, and it is hereby required to build on said High street over its railroad within three months from receiving notice of this resolution. That the bridge so ordered built shall be of sufficient size and strength to carry and hold such teams as ordinarily pass over such road and of such width as to allow teams to pass thereon, with a foot-path on either side of at least — feet wide, with railing both between the main passage and the outer edge of said bridge; that the bridge shall have such approaches to the highway as will warrant an easy grade to the said bridge.

The above resolution was on motion referred to the street committee.

I, J. J. Malley, clerk of the city of Defiance, State of Ohio, 48 do hereby certify that the above and foregoing resolution and vote is a true copy of the record as found in Journal A, page 60, of the city records.

[SEAL.] J. J. MALLEY, *City Clerk.*

COUNCIL CHAMBER, DEFIANCE, OHIO.

Regular meeting, December 5, 1882.

Members present: Houghton, Fenzer, Myers, Miller, Bechel, Holston—6.

On motion of Mr. Miller the resolution requiring the Wabash, St. Louis & Pacific railway to construct a bridge over their track at crossing of High street, in 3d ward, and recorded on page 60 of this journal, was adopted by the following votes:

Ayes—Fenzer, Myers, Miller, Bechel and Holston—5.

Nays—Houghton—1.

I, J. J. Malley, clerk of the city of Defiance, State of Ohio, do hereby certify that the above and foregoing motion and vote is a true copy of the record as found in Journal A of the city records.

[SEAL.] J. J. MALLEY, *City Clerk.*

PART OF BILL OF EXCEPTIONS—"EXHIBIT D."

Deposition of William Kirkby.

WILLIAM KIRKBY, of lawful age, being by me first duly cautioned and sworn, deposes and says, as follows:

First question. State what, if any, public office you now hold?

Answer. Commissioner of railroads and telegraph, of the State of Ohio.

2 Q. How long have you held that office?

A. Since May 1, 1892.

3 Q. What experience, if any, did you have in the management or operation of railroads prior to that time, so as to have knowledge of the general character of railroad tracks and public highways where they cross each other in this State?

A. I had ten years' experience in the actual management of railroads; my entire railroad experience comprised a period of twenty-eight years.

4 Q. What knowledge, if any, have you of the locality at the city of Defiance, in Defiance county, where the public highways,
49 known as Holgate pike and the Brunnersburg road, cross the Wabash railroad track?

A. I have been acquainted with those two crossings for thirty-five years. At the request of the city council of Defiance, I went to make a special examination of all the crossings in Defiance—I think it was in August, 1892, and at the request of Mr. Ralston, I went over to look at these crossings. I also went at the request of Mr. Newbegin, on the 3d of April last. I looked over the grounds to see how the crossings would be situated when they were cut down to grade.

5 Q. Please state what in your opinion would be the character of those crossings if reduced to grade level with the railroad track as to being dangerous or otherwise to the lives of the public crossing the track on the public highway?

A. They would be exceedingly dangerous, because the track is down grade there and it would make a ten to twelve foot cut below the surface of both streets, and the railroad track is also in a cut of about the same depth, and the sight and sound of approaching trains would be cut off from persons about to make the crossings.

6 Q. State whether in your opinion it will be possible to make those crossings, if reduced to grade level with the railroad track, secure and safe to the public traveling on the highways?

A. I don't think it could under the circumstances and location.

7 Q. As the State railroad commissioner, what in your present opinion would you require a railroad company to do to protect the public at those crossings if reduced to grade?

A. Put on watchmen at both crossings day and night.

8 Q. What is your opinion as to whether they would be made secure so as to be reasonably safe to the lives and limbs of the public making the crossings?

A. I don't think they would, because a grade crossing is never safe for foot passengers on account of children using them so frequently. I do not think, either, they would be safe to the public crossing with carriages and teams.

9 Q. What is your opinion, as the State railroad commissioner, as to whether those overhead bridge crossings should be removed and the crossings reduced to grade?

A. I do not think it could be done.

(Cross examination not offered in evidence.)

Re-examination by Mr. SMITH:

38 Q. In your judgment, how much space should be left between the top of the cars and the bottom of an overhead bridge on
50 a railroad in order to make the passage safe for trainmen?

A. It should not be less than seven feet. I will give you my reasons for that: It is that a man running along from one box car to another may be in the act of jumping from one box car to another; that increases his elevation at the time on top.

39 Q. You have said that the rule of your office requires twenty-two feet in all new structures from the track to the bottom of the bridges; why was that rule adopted, Mr. Kirkby?

A. It was adopted on account of the raise in the height of the car. There had been a rule for eighteen feet; there would be no objection filed by the office against a structure existing eighteen feet.

40 Q. You said in your cross-examination that at the time you examined these bridges in company with Mr. Ralston, in August, 1892, you expressed the opinion that the difficulty with the approaches could be remedied at no great expense; how could this be done?

A. By merging those two roads into one and putting in an iron bridge there.

41 Q. I don't think you understand my question. I will repeat it: You said, in your cross-examination, that at the time you examined these bridges, in company with Mr. Ralston, in August, 1892, you expressed the opinion that the difficulty with the approaches could be remedied at no great expense. How could this be done?

A. In taking those two roads into one the approach could be made easy by giving it a width there it has not got now. That would make it easier to approach, and that would take the distance further back from the bridge to commence the approach: they would have to start back quite a little distance and make the approach to the bridge.

42 Q. And that would be irrespective of whether it was an iron bridge or a wooden bridge?

A. Oh, yes, sir; that could be done irrespective of that, but an iron bridge could be lower without interfering with the height between the rail and the bridge.

An objection was made by the defendant and sustained by the court to question 5 of said deposition of William Kirkby, to which

the plaintiff excepted and stated to the court that they expected to prove the contents of the answer as stated in the deposition.

An objection was made by the defendant and sustained by the court to question 6 of said deposition of Wm. Kirkby, to which the plaintiff excepted and stated to the court that they offered to
51 prove the contents of the answer to question 6 in said deposition.

An objection was made by the defense and sustained by the court to question 7 of said deposition of Wm. Kirkby, to which the plaintiff excepted and stated to the court that they expected to prove the contents of the answer to question 7.

An objection was made by the defendant and sustained by the court to question 8 of said deposition of said Wm. Kirkby, to which the plaintiff excepted and offered to prove the contents of the answer as stated in the deposition to the said question.

An objection was made by the defendant and sustained by the court to question 9 of said deposition of Wm. Kirkby, to which the plaintiff excepted and stated to the court and offered to prove the contents of the answer in the said deposition to said question.

The cross-examination of Wm. Kirkby was not given in evidence nor offered to be given by either party.

An objection was made by the defendant and sustained by the court to question 38 on re-examination of said deposition of William Kirkby, to which the plaintiff excepted and offered to prove the contents of his answer to said question 38 of said deposition.

Said deposition of Wm. Kirkby is hereunto annexed, marked "Exhibit D," and hereby made a part of this bill of exceptions, except the cross-examination, not given in evidence nor offered to be given.

DEPOSITION OF H. L. MAGEE—"EXHIBIT E,"

Who, in answer to question 1, stated that his age was 46 years, residence, St. Louis, Mo.

Q. 2. What official position, if any, do you occupy on the Wabash railroad?

A. General superintendent.

Q. 3. How long have you occupied such position?

A. Four and a quarter years.

Q. 4. What other positions have you occupied and what experience have you had in the operation of railroads?

A. Have been in active railroad service for 32 years, commencing in the track department, holding different positions, as track foreman, roadmaster, trainmaster and division superintendent on various railroads in Wisconsin, Minnesota, Florida, Texas and Louisiana, and for the past seven and one-half years with
52 the Wabash Railroad Company; first three years and over, as superintendent in lines in Missouri and Iowa, and the past and quarter years as general superintendent of all the Wabash lines in Iowa, Missouri, Illinois, Indiana, Ohio and Michigan, which position hold at this time.

Q. 5. State whether or not you are familiar with the matters in controversy between the city of Defiance and the Wabash Railroad Company, respecting the overhead bridges at Ralston and Clinton avenues in said city, on the line of said railroad.

A. Yes, sir; I am familiar with the situation.

Q. 5½. State whether or not the plat herewith attached to this deposition, and marked Exhibit A, is a correct representation of the location of the Wabash Railway tracks and the overhead bridges over Ralston and Clinton avenues over said tracks in the city of Defiance.

A. Yes, sir; the tracing is correct.

(See plats M and N. Exhibits to original bill not printed.)

Q. 6. Have you ever, at any time, examined the ground at these points in said city of Defiance, Ohio, and, if so, did you personally inspect said bridges, and when was such inspection made?

A. I have made such personal inspection—in the fall of 1892.

Q. 7. Has there been any changes made in the grades at Ralston and Clinton avenues in said city, or in the line of railroad or its surroundings since you made such inspection?

A. No, sir; there have been no changes made.

Q. 8. What, in your opinion, would be the effect of removing the present overhead bridges across the Wabash Railroad tracks at Ralston and Clinton avenues, in the city of Defiance, Ohio, and of substituting therefor grade crossings, as directed by the present ordinances of said city?

A. The effect of removing said bridges and making grade crossings would, in my opinion, make them very dangerous crossings for the public, as well as for the railroad company. It would increase the danger to the lives of those who would have to cross, as well as the lives of the trainmen, owing to the crossings being in a deep cut approaching the railroad tracks from either side, and the railroad track approaching the crossing from the west being on a curve.

Q. 9. What, in your opinion, would be a safe distance, in the interest of the public safety, and in view of the better protection of the employés of the railway companies, for such bridges to clear the railroad tracks at those points?

53 A. Twenty-one feet. Anything less than that would increase the danger to lives of men connected in the operation of trains, as there is a tendency of all freight cars being enlarged, and at the present time freight cars will average at least a foot higher than a few years ago; standard freight cars have increased in capacity from 20,000 to 60,000 pounds. Furniture, hay and other cars, in which bulky freight is transported at the present time, are considerably higher than a few years ago. This is not alone the fact with Wabash cars, but all foreign cars which pass over the Wabash track, and which the Wabash road is compelled to haul under the laws of all the States.

Q. 10. Did you ever have any conference on the subject of these overhead bridges with any of the city officials of Defiance, Ohio, at

any time, and if so, when was such conference had, and what understanding or agreement, if any, resulted therefrom?

A. I had a conference with officers connected with the city of Defiance. This interview I had in the fall of 1892, in reference to the overhead highway bridges in order to make them safe and practical to the public and to the railroad company. I met the president of the city council of Defiance, Mr. Edward Squire, and several of the city councilmen of Defiance, and was told by them that the objection to the overhead bridges was on account of the approaches being too steep. On behalf of the railroad company I offered to reconstruct the bridges and extend the grades of the approaches in such manner as to give easier and safer crossings, and that any damages done to the abutting property by reason of the extending of the grade of the approaches to the bridges would be paid by the company, as well as the cost of reconstructing and changes made in said bridges and approaches. The city officials expressed their opinion that the offer of the railroad company was the best disposition of the matter that had been suggested, and that there was no doubt that it would be accepted by the city of Defiance. Since the time of this conference with the city officials in the fall of 1892, the bridge crossing the tracks on Ralston avenue has been partially taken down, as I understand it, by order of the city. In my opinion, the bridges should be maintained at these two points in the interest of the safety of the public, as well as the railroad company, as they now are.

[SEAL.] H. L. MAGEE.

54 An objection was made by the defendant, and sustained by the court, to question 8 of said deposition of Mr. Magee, to which the plaintiff excepted and offered to prove the contents of the answer to said question 8 in said deposition.

An objection was made by the defendant, and sustained by the court, to question 9 of said deposition of Magee, to which the plaintiff excepted, and offered to prove the contents of the answer to said question 9 in said deposition.

(Mr. Hubbard moved here to strike out all the conversations and conferences of the superintendent. Motion sustained.)

(Exception to the ruling out of the testimony of Mr. Magee.)

Said deposition is hereunto annexed, marked "Exhibit E," and made a part of this bill of exceptions.

DEPOSITION OF W. S. LINCOLN—"EXHIBIT F."

W. S. LINCOLN, of lawful age, being by me first duly cautioned and sworn, deposes and says, as follows:

Q. 1. What is your name, age and residence?

A. W. S. Lincoln, age 56; residence, St. Louis.

Q. 2. What official position, if any, do you occupy on the Wabash railroad?

A. Chief engineer of the Wabash railroad.

Q. 3. How long have you occupied such position?

A. Twelve years past.

Q. 4. What other positions have you occupied and what experience have you had in the operation of railroads?

A. I was principal assistant engineer in the construction of the old Chicago & Cincinnati railroad, from Richmond, Ind., to Valparaiso, Ind., from 1856 to 1861. During 1861 and 1862, I was consulting engineer of Chicago & Great Eastern from La Crosse, Ind., to Chicago; from 1861 to 1865 I was engineer and assistant superintendent of the Cincinnati & Chicago railroad; 1865 I commenced on the Wabash road as engineer of what was then the Western division, from Danville, Ill., to Quincy and Keokuk; remained in that position until 1868, when I was appointed chief engineer of the Decatur & East St. Louis road and built that line from Decatur to East St. Louis, completing it in July, 1870; first of September, 1870, I went to Toledo as engineer of the Eastern division of the Wabash road, extending from Toledo to Danville, and remained in Toledo until the first of January, 1880. In the meantime, and during 1871 and 1872, I was consulting
55 engineer of the Lafayette, Muncie & Bloomington, and Lafayette, Bloomington & Mississippi railroads, which were completed in the latter part of 1872. In 1873, I had charge of the rebuilding of the yards at Toledo, Ohio, and of the building of a large grain elevator at that point, and of all the tracks connected with it. January 1, 1880, I went to Springfield, Ill., in charge of the road department, maintenance of way of all lines owned by the Wabash east of the Mississippi river, and in the meantime had charge of the rebuilding of the Chicago & Paducah railroad, and of the construction of the Chicago & Strawn road, and the Attica, Covington & Southern. First of September, 1881, I was appointed chief engineer of the Wabash, St. Louis & Pacific, and am holding that position at the present time. Since having been appointed chief engineer of the Wabash road, have had charge of the completion of the Des Moines and St. Louis, also of the Des Moines and Northwestern road, also as consulting engineer for the Detroit, Butler & St. Louis road, and the Union Depot terminals in Detroit, and of the Wabash terminals in Chicago. In 1891, August 1st, commenced building the Chicago & Montpelier railroad, and had entire charge of that work, finishing the same on the 1st of June, 1893. In the meantime, during my term of service with the Wabash, I have rebuilt a great many bridges, in fact all the important bridges on the Wabash road, embracing the construction of the masonry connected with the bridges; in fact, had charge of all the work incident to the repair, renewal and reconstruction of the roadway, buildings, shops, yards and engine-houses on the whole line.

Q. 5. State whether or not you are familiar with the matters in controversy between the city of Defiance and the Wabash Railroad Company, respecting the overhead bridges at Ralston and Clinton avenues, in said city, on the line of said railroad.

A. I understand the situation of the bridges in controversy and their location.

Q. 6. Have you ever, at any time, examined the ground at these points in said city of Defiance, Ohio, and if so, did you personally inspect said bridges, and when was such inspection made?

A. About twenty years ago I made an examination of these bridges with the view of having them rebuilt at the time.

Q. 7. What, in your opinion, would be the effect of removing the present overhead bridges across the Wabash Railroad tracks
56 at Ralston and Clinton avenues, in the city of Defiance, Ohio, and of substituting therefor grade crossings, as directed by the present ordinances of said city?

A. I think the effect of removing these bridges and substituting grade crossings in their place would be extremely disastrous to the traveling public, and that such a change should not be made. The construction of grade crossings at such a point would be simply to make a death-trap for everybody traveling on the roads, and, in my opinion, such an act would be criminal. It would also greatly increase the danger to passengers in transit on trains of the Wabash railroad, to freight and property being transported by the railroad, and to the lives of the men employed on the trains.

Q. 9. What, in your opinion, would be a safe distance in the interest of the public safety and in view of the better protection of the employés of the railroad companies, for such bridges to clear the railroad tracks at these points?

A. I think the bridges should be built with a distance of at least twenty-one feet in the clear above the top of the rail. This distance is made necessary by the increased height of cars now in use on all the roads in the country.

[SEAL.] W. S. LINCOLN.

An objection was made by the defendant, and sustained by the court, to question 7 of said deposition of W. S. Lincoln, to which the plaintiff excepted and offered to prove the contents of the answer to said question in said deposition.

An objection was made by the defendant, and sustained by the court to question 9 of said deposition of W. S. Lincoln, to which the plaintiff excepted, and offered to prove the contents of the answer to said question 9 of said deposition.

Said deposition of W. S. Lincoln is hereunto annexed, marked "Exhibit F," and hereby made a part of this bill of exceptions.

DEPOSITION OF MR. E. P. BRYAN—"EXHIBIT G."

E. P. BRYAN, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Q. 1. What is your name, age and residence?

A. E. P. Bryan, age 46, residence St. Louis.

Q. 2. What official position, if any, do you occupy on any railroad in the State of Illinois or elsewhere?

A. I am superintendent of terminals of Louisville & Nash-

ville railroad, which road terminates at East St. Louis and
57 reaches to Florida, Mobile and the South. We run through the States of Illinois, Indiana, Tennessee, Alabama, Florida, Mississippi and Louisiana. I am also president of the St. Louis Superintendents' Association, the membership being composed of all superintendents of all roads terminating in St. Louis.

Q. 3. How long have you occupied such positions?

A. I have been superintendent of terminals of the L. & N. at this point for about two years; president of the Superintendents' Association since last January.

Q. 4. What other positions have you occupied, and what other experience, if any, have you had, in the construction, operation and management of railroads?

A. I have been with the Louisville & Nashville railroad in various capacities for 25 years; was formerly superintendent of terminals at Louisville, Ky.; had charge of all the terminals at Louisville, Ky., the headquarters of the Louisville & Nashville railway.

Q. 5. What experience, if any, have you had in the construction and maintenance of overhead bridges, over railway tracks in cities at street crossings?

A. I have had a great deal to do with street crossings, watchmen at gates. While at Louisville we had twenty-one gate watchmen at grade crossings. At Louisville, Ky., where the Louisville & Nashville railroad crosses Kentucky street, with eleven tracks, the city of Louisville recently prepared to repave this street with granite, the estimated cost of which was about $20,000. The Louisville & Nashville road by its president, M. H. Smith, went before the city council and proposed to pay the additional cost over the estimated cost for paving, and the cost of a viaduct carrying the street over these tracks, which was about $30,000, the Louisville & Nashville road preferring this additional expense rather than assume constant risk from passing vehicles and pedestrians on a grade crossing, although said crossing was protected on each side by gates and watchmen. The proposed viaduct would necessitate five per cent. grade on the approaches in order to give a clearance of not less than twenty feet above the rails.

Q. 6. Have you examined the profile and plat of the overhead bridges as now constructed over Ralston Ave. and Clinton street in Defiance, Ohio, so as to be able to express an opinion concerning the removal of those two bridges across the Wabash tracks in that city, and the substitution there of grade crossings therefor?

A. I have.

58 Q. 7. What, in your opinion, will be the effect of the removal of those two overhead bridges at the points indicated on said plat, in said city of Defiance, and the substitution of grade crossings therefor in said city, it being an additional fact that said streets will in that event cross the Wabash railway track through a deep cut in said city as indicated on said plat?

A. I would state that where it is possible to avoid a grade crossing, it is always well to do so, and where the conditions exist, as shown in this plat, located in a community where a crossing is con-

stantly used, it would be almost criminal to make a grade crossing where it can be avoided, as it can in this case.

Q. 8. What, in your judgment as a practical railroad man, would be the necessary clearance for overhead bridges at the points indicated on the plat at Ralston Ave. and Clinton street over the Wabash tracks in the city of Defiance?

A. Our specifications call for not less than twenty feet for overhead bridges; we prefer twenty-one or more, where it is possible to get it; the higher the better.

Q. 9. What would be the effect, in your judgment, as a practical railroad man, of maintaining grade crossings in lieu of the present overhead bridges at Ralston Ave. and Clinton street in the city of Defiance, over the Wabash Railway track where said railway track at the intersection of said highways runs through a cut fourteen to sixteen feet deep on a curve, and where, when said highways are thus reduced to grade crossings as directed by the ordinances of city of Defiance, now in force, said crossings will still be located in a deep cut?

A. I should think the effect would be to increase the danger and risk of accident from a minimum to a maximum, and that the utmost care in the operation of a road under such conditions would be required to prevent frequent accidents. And with the utmost care it would be impossible to prevent frequent accidents occurring at a point situated as this is.

[SEAL.] E. P. BRYAN.

An objection was made by the defendant, and sustained by the court, to question 7 of said deposition of Mr. Bryan, to which the plaintiff excepted, and stated to the court that they expected to prove, and offered to prove, the answers to said question 7 in said deposition.

An objection was made by the defendant, and sustained by the court, to question 8 of said deposition of Mr. Bryan, to which
59 the plaintiff excepted, and stated to the court and offered to prove the contents of the answer to said question 8 in said deposition.

An objection was made by the defendant, and sustained by the court, to question 9 of said deposition of Mr. Bryan, to which the plaintiff excepted and stated to the court that they expected, and offered to prove to the court, the answer of said Mr. Bryan to said question 9 in said deposition.

Said deposition of Mr. Bryan is hereunto annexed, marked "Exhibit G," and hereby made a part of the bill of exceptions.

DEPOSITION OF R. M. PECK—"EXHIBIT H."

R. M. PECK, of lawful age, being by me first duly cautioned and sworn, deposes and says, as follows:

Q. 1. What is your name, age and residence?

A. R. M. Peck, live at Pacific, Mo.; age fifty-nine years.

ville railroad, which road terminates at East St. Louis and
57 reaches to Florida, Mobile and the South. We run through the States of Illinois, Indiana, Tennessee, Alabama, Florida, Mississippi and Louisiana. I am also president of the St. Louis Superintendents' Association, the membership being composed of all superintendents of all roads terminating in St. Louis.

Q. 3. How long have you occupied such positions?

A. I have been superintendent of terminals of the L. & N. at this point for about two years; president of the Superintendents' Association since last January.

Q. 4. What other positions have you occupied, and what other experience, if any, have you had, in the construction, operation and management of railroads?

A. I have been with the Louisville & Nashville railroad in various capacities for 25 years; was formerly superintendent of terminals at Louisville, Ky.; had charge of all the terminals at Louisville, Ky., the headquarters of the Louisville & Nashville railway.

Q. 5. What experience, if any, have you had in the construction and maintenance of overhead bridges, over railway tracks in cities at street crossings?

A. I have had a great deal to do with street crossings, watchmen at gates. While at Louisville we had twenty-one gate watchmen at grade crossings. At Louisville, Ky., where the Louisville & Nashville railroad crosses Kentucky street, with eleven tracks, the city of Louisville recently prepared to repave this street with granite, the estimated cost of which was about $20,000. The Louisville & Nashville road by its president, M. H. Smith, went before the city council and proposed to pay the additional cost over the estimated cost for paving, and the cost of a viaduct carrying the street over these tracks, which was about $30,000, the Louisville & Nashville road preferring this additional expense rather than assume constant risk from passing vehicles and pedestrians on a grade crossing, although said crossing was protected on each side by gates and watchmen. The proposed viaduct would necessitate five per cent. grade on the approaches in order to give a clearance of not less than twenty feet above the rails.

Q. 6. Have you examined the profile and plat of the overhead bridges as now constructed over Ralston Ave. and Clinton street in Defiance, Ohio, so as to be able to express an opinion concerning the removal of those two bridges across the Wabash tracks in that city, and the substitution there of grade crossings therefor?

A. I have.

58 Q. 7. What, in your opinion, will be the effect of the removal of those two overhead bridges at the points indicated on said plat, in said city of Defiance, and the substitution of grade crossings therefor in said city, it being an additional fact that said streets will in that event cross the Wabash railway track through a deep cut in said city as indicated on said plat?

A. I would state that where it is possible to avoid a grade crossing, it is always well to do so, and where the conditions exist, as shown in this plat, located in a community where a crossing is con-

stantly used, it would be almost criminal to make a grade crossing where it can be avoided, as it can in this case.

Q. 8. What, in your judgment as a practical railroad man, would be the necessary clearance for overhead bridges at the points indicated on the plat at Ralston Ave. and Clinton street over the Wabash tracks in the city of Defiance?

A. Our specifications call for not less than twenty feet for overhead bridges; we prefer twenty-one or more, where it is possible to get it; the higher the better.

Q. 9. What would be the effect, in your judgment, as a practical railroad man, of maintaining grade crossings in lieu of the present overhead bridges at Ralston Ave. and Clinton street in the city of Defiance, over the Wabash Railway track where said railway track at the intersection of said highways runs through a cut fourteen to sixteen feet deep on a curve, and where, when said highways are thus reduced to grade crossings as directed by the ordinances of city of Defiance, now in force, said crossings will still be located in a deep cut?

A. I should think the effect would be to increase the danger and risk of accident from a minimum to a maximum, and that the utmost care in the operation of a road under such conditions would be required to prevent frequent accidents. And with the utmost care it would be impossible to prevent frequent accidents occurring at a point situated as this is.

[SEAL.] E. P. BRYAN.

An objection was made by the defendant, and sustained by the court, to question 7 of said deposition of Mr. Bryan, to which the plaintiff excepted, and stated to the court that they expected to prove, and offered to prove, the answers to said question 7 in said deposition.

An objection was made by the defendant, and sustained by the court, to question 8 of said deposition of Mr. Bryan, to which
59 the plaintiff excepted, and stated to the court and offered to prove the contents of the answer to said question 8 in said deposition.

An objection was made by the defendant, and sustained by the court, to question 9 of said deposition of Mr. Bryan, to which the plaintiff excepted and stated to the court that they expected, and offered to prove to the court, the answer of said Mr. Bryan to said question 9 in said deposition.

Said deposition of Mr. Bryan is hereunto annexed, marked "Exhibit G," and hereby made a part of the bill of exceptions.

Deposition of R. M. Peck—"Exhibit H."

R. M. Peck, of lawful age, being by me first duly cautioned and sworn, deposes and says, as follows:

Q. 1. What is your name, age and residence?

A. R. M. Peck, live at Pacific, Mo.; age fifty-nine years.

Q. 2. What official position, if any, do you occupy on any railroad in the State of Missouri or elsewhere?

A. I am superintendent of bridges and buildings of the Missouri Pacific system. The lines of this road extend through Missouri, Arkansas, Kansas and Nebraska.

Q. 3. How long have you occupied such position?

A. Twenty-three years. I have been engaged in bridge-building thirty-five years.

Q. 3½. What other position have you occupied and what other experience, if any, have you had in the construction and maintenance of bridges over highway crossings or elsewhere upon railroad lines?

A. I had experience on the Chicago & Alton and Illinois Central. My connection with those roads was in the capacity of a builder, not in charge of work. I have been engaged in a supervising capacity of bridges and buildings about twenty-seven years. Prior to my service on the Missouri Pacific, I was engaged on the Southwest branch of the Missouri Pacific and the Atlantic & Pacific, now known as the St. Louis & San Francisco R. R. I have also had charge of bridges and buildings in a supervising capacity on the Missouri, Kansas & Texas railroad. Have also supervised work on the International & Great Northern and on the Texas Pacific.

Q. 4. What experience, if any, have you had in the construction and maintenance of overhead bridges over railway tracks in cities at street crossings?

A. I have had charge of the maintenance of all overhead bridges in all the cities through which the Missouri Pacific railway
60 runs, for the entire time in which I have been engaged with that road.

Q. 5. Have you heard the testimony just given of Mr. Henry W. Gays, general manager of the St. Louis Merchants' Bridge Terminal in the controversy between the city of Defiance, Ohio, and the Wabash Railroad Company, concerning the removal of certain overhead bridges across the Wabash tracks in said city, and the substitution of grade crossings therefor at Ralston and Clinton Aves., in said city?

A. I have.

Q. 6. What, in your opinion, as a practical bridge-builder and experienced railroad man, would be the effect of such proposed changes?

A. It is my opinion that it would subject the railway company and the public to liability of serious loss and trouble, on account of extraordinary liability to accident.

Q. 8. State whether or not, in your opinion, as a practical railway man, it would be better both for the public and as a safeguard to the employés of the Wabash railroad, to continue to use the overhead bridges now standing in said city, across the railway tracks of the Wabash railroad at the two streets above named?

A. It would be undoubtedly better. I do not think there can be any question in reference to the matter.

Q. 7. What, in your opinion, in the interest of the public safety and in view of the better protection of the employés of the railway companies, would be a safe distance for such bridges to clear the railroad tracks at those points?

A. The minimum clearance should be at least twenty-one feet.

Q. 8. What, in your opinion, would be the effect so far as the public is concerned, of removing the present overhead bridges at those points, and substituting grade crossings therefor?

A. It is my opinion that it would subject the public to great liability to accident. I am of the opinion that the present overhead bridges would be entirely safe, comparatively speaking.

[SEAL.] R. M. PECK.

An objection was made by the defendant, and sustained by the court, to question 6 of said deposition of R. M. Peck, to which the plaintiff excepted and offered to prove the contents of the answer to said question 6 in said deposition.

An objection was made by the defendant, and sustained by
61 the court, to question 7 of said deposition of R. M. Peck, to which the plaintiff excepted and stated to the court, and offered to prove, the contents of the answer to said question 7 in said deposition.

An objection was made by the defendant, and sustained by the court, to question 8 of said deposition of R. M. Peck, to which the plaintiff excepted and offered to prove the contents of the answer to said question 8 in said deposition.

Said deposition of R. M. Peck is hereunto annexed, marked "Exhibit H," and hereby made a part of this bill of exceptions.

DEPOSITION OF H. W. GAYS—"EXHIBIT I."

HENRY W. GAYS, of lawful age, being by me first duly cautioned and sworn, deposes and says as follows:

Q. 1. What is your name, age and residence?

A. Henry W. Gays, St. Louis, Missouri; age forty-four years.

Q. 2. What official position, if any, do you occupy, on any railroad in the city of St. Louis or State of Illinois?

A. General manager of the St. Louis Merchants' Bridge R. R. Co. and operated properties in Illinois. The Illinois properties are the Venice & Carondelet Belt and the Madison, Illinois & St. Louis railroads. The St. Louis Merchants' Bridge Terminal is located in the city of St. Louis, and performs a switching service and terminal service for other railway companies, the location of the tracks being along, across and over a large number of streets in the city.

Q. 3. How long have you occupied such position?

A. Four years nearly.

Q. 3½. What other position have you occupied and what other experience, if any, have you had in the construction, operation and management of railroads?

A. Immediately previous to my present position and for four years,

I was general manager of the East St. Louis Connecting railway, located in city of East St. Louis, Illinois, tracks of which company are laid along and across a number of streets in that city; and the St. Louis Transfer railway, located in the city of St. Louis, along and across a number of streets in the city of St. Louis. Both companies perform switching service and terminal service for other railway companies.

Q. 4. What experience, if any, have you had in the construction and maintenance of overhead bridges over railway tracks in cities at street crossings?

A. In the case of the St. Louis Merchants' Bridge Terminal, I have been connected with that company during its period of
62 construction. This includes the construction of the bridge approach on the Illinois side, that reaches the ground immediately east of the Wabash tracks in Illinois, near the town of Venice. With the exception of mile and seven-eighths of elevated tracks the Merchants' Terminal crosses the streets and other railways at grade. In the case of the elevated, it crosses the Missouri Pacific railway on a viaduct which crosses over Poplar street, giving a clearance over the Missouri Pacific track of twenty-three feet.

Q. 5. Have you examined the profile and plat of the overhead bridges as now constructed over Ralston avenue and Clinton street, in the city of Defiance, Ohio, so as to be able to express an opinion concerning the removal of those two bridges across the Wabash tracks in that city, and the substitution there of grade crossings therefor?

A. Yes.

Q. 6. What, in your opinion, will be the effect of the removal of those two overhead bridges at the points indicated in said plat, in said city of Defiance, and the substitution therefor of grade crossings, in said city, it being an additional fact that said streets will, in that event, cross the Wabash Railroad track through a deep cut in said city, as indicated on said plat?

A. To remove the overhead bridge and substitute therefor grade crossing, under the conditions as indicated on the plat, would add materially to the dangers of the users of the crossings, both to the users of the railway and the users of the streets.

Q. 7. What, in your judgment as a practical railroad man, would be the necessary clearance for an overhead bridge, or bridges, at the points indicated on the plat at Ralston Ave. and Clinton street, over the Wabash tracks, in the city of Defiance, Ohio?

A. The clearance should not be less than twenty-one feet; if possible it should be a greater distance, for the reason that the height of the cars is such that those persons whose business it is to be on top of the cars, including trainmen as well as those persons who have a right to be on top of the cars, that it requires at least twenty-one feet to give car and person a clearance. A less distance would be a constant menace to the personal injury of persons so engaged.

Q. 8. What would be the effect in your judgment, as a practical railroad man, of maintaining grade crossings in lieu of the present

overhead bridges at Ralston avenue and Clinton street, in the city of Defiance, over the Wabash Railway track where said railway track, at the intersection of such highways, runs through a
63 cut fourteen to sixteen feet deep on a curve, and where when said highways are thus reduced to grade crossings, as directed by the ordinances of the city of Defiance, now in force, said crossings will still be located in a deep cut?

A. Such a proceeding would so seriously add to the dangers of the users of the crossings that my judgment is that it should not be done. Certainly, as a railway manager, I would object most seriously to such a course, for the reason that a blind crossing of the character that this would make it, could not be fully protected by any appliance known as gate device, so that the public would have the full safeguard that the overhead bridge gives them at the present time. Such a course would substitute for what is now practically a safe crossing, and make it extremely dangerous to the users of same.

[SEAL.] H. W. GAYS.

An objection was made by the defendant and sustained by the court to question 6 of said deposition of said Henry W. Gays, to which the plaintiff excepted and offered to prove the contents of the answer to said question 6 of said deposition

An objection was made by the defendant and sustained by the court to question 7 of said deposition of Henry W. Gays, to which the plaintiff excepted and offered to prove the contents of the answer to said question 7 in said deposition.

An objection was made by the defendant and sustained by the court to question 8 of said deposition of Henry W. Gays, to which the plaintiff excepted and offered to prove the contents of the answer to said question 8 in said deposition.

Said deposition of Henry W. Gays is hereunto annexed, marked "Exhibit I," and made a part of this bill of exceptions.

DEPOSITION OF P. C. SNEED—"EXHIBIT K."

P. C. SNEED, being first duly sworn, testified as follows in answer to the following interrogatories:

Examined by Mr. NEWBEGIN:

Q. Please state your name, age, occupation and place of residence.

A. P. C. Sneed, superintendent of the Chicago division of the Baltimore & Ohio railroad; age, thirty; I reside at Garrett, Ind.

Q. Please state, Mr. Sneed, what experience you have had
64 in practical railroading.

A. I have been in the operating department of railroads for the past sixteen years, for the past two years and a half as division superintendent for the Baltimore & Ohio Railroad Company.

Q. Have you knowledge of the locality, at the city of Defiance, Ohio, where the so-called Ralston Ave., and North Clinton street cross the Wabash Railroad track by means of overhead bridges?

A. Yes, sir.

Q. Do you know of the curve in the Wabash Railroad track near those bridges and of the grading of the railroad there?

A. I noticed that there was a curve and a grade, but cannot now say the extent of either.

Q. Please state when it was that you visited that locality, and under what circumstances.

A. In the summer of 1892. I went to Defiance with the Ohio railroad commissioner to look after some B. & O. matters at that point. During this visit, the commissioner, in connection with several members of the Defiance city council, drove to the locality above referred to, to inspect the two bridges, and I accompanied them.

Q. You may state now, Mr. Sneed, what, in your opinion, would be the character of those crossings at Ralston avenue and North Clinton street, if reduced to grade with the railroad track, as to being safe to the public, and safe to the passengers and property of the railroad company in running its trains.

A. If these crossings were reduced to grade with the railroad track, the streets would be in quite a deep cut, which would necessarily obstruct the view of persons using the street, and would also prevent them hearing distinctly the approach of trains. I therefore think such crossings would be dangerous to persons and teams so using them, and would increase the liability of accident. It is impossible to say to what extent such accidents would damage the property and passengers of the Wabash Railroad Company, but serious accidents would be likely to occur.

Q. Considering the fact that the proposed grade will be nearly as steep in its descent to the grade crossings, if made, as it is now in its ascent over the bridges, and that when so reduced to grade, there will be, at the points where it crosses the Wabash track, but a level of fifty feet; that is, twenty-five feet from the center of the track on either side, and the steep grade from the north toward the river of the Wabash track, and also quite a sharp curve east of the highway crossings toward the Maumee river; what do you say as to its being practicable by any appliance known to railroad men to protect those crossings, so as to make them safe either to the traveling public or to the company in running its trains, if reduced to grade?

65

A. I think such a crossing would be dangerous, and have no knowledge of any appliance which would render such a crossing absolutely safe.

Q. Do you think it could be rendered reasonably safe by means of watchmen, or gates, or electrical appliance; that is, as compared with their safety now by means of the overhead bridges?

A. The element of danger could be to a great extent removed by the use of crossing gates, electric bells and watchmen, but no appliance of this kind in use by railroad companies, that I have seen,

would always accomplish what it is intended to do; neither can watchmen always be depended upon, and it is my experience that persons will cross railroad tracks in front of approaching trains in spite of the warnings and commands of watchmen. I therefore think the overhead bridges much safer than the grade crossings can be made to be.

Q. Taking into consideration the height of modern freight cars, especially the extra height of so-called refrigerator cars and furniture cars that are now taken in freight trains of railroad companies, how high in the clear above the track is it necessary to have the lower timbers of overhead bridges in order to protect trainmen running trains?

A. Many of such cars now hauled over the various roads are over fourteen feet high, and in order to clear the head of a six-foot man the lowest timbers on such bridges should, in my opinion, be twenty-one feet from the top of the rail.

(Cross-examination not offered by either party.)

An objection was made by the defendant and sustained by the court to question 2 on page No. 2 of Mr. Sneed's deposition, to which the plaintiff excepted and stayed and offered to prove to the court the contents of the answer to said question 2 on page No. 2 of said deposition.

An objection was made by the defendant and sustained by the court to question 3, page No. 2, of said deposition of P. C. Sneed, and the plaintiff excepted and stated to the court that they expected to prove and offered to prove to the court the contents of the answer to said question 3 on page No. 2 of said deposition.

66 An objection was made by the defendant and sustained by the court to the first question on page 3 of said deposition of said P. C. Sneed, to which the plaintiff excepted and offered to prove to the court the contents of the answer to said first question on said third page of said deposition.

An objection was made by the defendant and sustained by the court to the third question on page 3 of said deposition of P. C. Sneed, to which the plaintiff excepted and offered to prove the contents of the answer to said second question on page 3 of said deposition.

Said deposition of P. C. Sneed is hereunto annexed, marked "Exhibit K," and hereby made a part of this bill of exceptions, except the cross-examination, not read nor offered to be read in evidence by either party.

And further to sustain the issues on its part the plaintiff called as a witness—

Mr. J. J. MALLEY, who, being first duly sworn, testified as follows:

Examination by Mr. NEWBEGIN:

Q. You may state to the court what office, if any, you now fill.

A. I am clerk of the city of Defiance.

Q. What are your duties as such?

A. Keeping a record of the council proceedings.

Q. Do you attend its meetings?

A. All the meetings of the council.

Q. Do you remember when the first talk was had in the council or any discussion came up about the introduction or passage of these so-called ordinances purporting to improve by grading down North Clinton street and Ralston avenue?

A. I have a recollection of the discussion.

Q. Who first introduced the subject to the council, do you know?

Objection; objection sustained; exception. (Exception.)

Mr. NEWBEGIN (to the court): We propose to show that the whole discussion of the members of the council at the time of the introduction and passage of these ordinances for so-called improvements related to the overhead bridges in question of the Wabash Railroad Company, and the object and intent of the passage of these ordinances, as shown by the discussion of members of the council prior and at the time they were passed, was to do away with those bridges and not for the purpose of carrying into effect the improvements.

67 Mr. SMITH:

Q. Where is the record of the ordinance of December, 1887?

A. It is there.

Mr. NEWBEGIN (to the court): I propose to prove the same as I have above stated, and I offer to prove the same by Mr. Martin Perky, Mr. Ralston, members of the council, Mr. William Carter, Mr. E. A. Gould and Mr. Woodard.

The same objections were made and the same offers to prove by the testimony of these last-named witnesses as in the testimony of J. J. Malley, and the objections were sustained and exceptions in each instance taken. (Exception.)

Mr. NEWBEGIN (to Mr. Hubbard): You have stated that the Wabash Company has property that would be assessed and charged with taxes to pay its share of that improvement, if made.

Mr. HUBBARD: I don't know anything about it.

The COURT: If the Wabash railroad is taxed in the city of Defiance it might as well be conceded.

Mr. HUBBARD (to the court): Yes.

Mr. SMITH (to the court): We offer the profiles and tracings introduced here, and I would like to have the court note that it is admitted that the plaintiff in this case became the purchaser at judicial sale in the foreclosure proceedings set out in the pleadings, which had been operated by the receiver up to the date of the same. And for the same purpose I may want to offer the original record of the ordinance under which we claim. We may want to introduce that; with that we will rest our case.

Profiles and tracings named above hereunto annexed, marked

Exhibits M and N, respectively, and hereby made a part of this bill of exceptions. (Not printed; see original bill of exceptions.)

We desire it noted that it is admitted and agreed by both sides that at the time of the passage of this ordinance of December, 1887, and at all times since that time, these roads or streets which are mentioned in the ordinances and resolutions, these bridge crossings, were within the territorial limits of the city of Defiance, in the State of Ohio, and it is also admitted that notices of the passage of these declaratory resolutions set up in the answer were served upon the freight and ticket agents of the plaintiff in the city of Defiance, and copies mailed by the city clerk to the office of the superintendent, Mr. Gould, in Peru, Indiana.

Plaintiff here rested its case.

68 *The Defense.*

The defendant, to sustain the issues on its part, offered as a witness—

Mr. J. J. MALLEY, who, being first duly sworn, testified as follows:

Examination by Mr. HUBBARD:

Q. Produce the record of the passage of those resolutions.

Mr. SMITH: There is no contest over those resolutions.

Mr. HUBBARD (to the witness):

Q. Were you present at the time of the adoption of the ordinance mentioned in the plaintiff's petition for the improvement of Ralston avenue and North Clinton street?

A. Yes, sir; I was.

Q. I will inquire of you whether or not Mr. Gould, the plaintiff's superintendent, who has testified, was present on that occasion?

A. My recollection is he was.

Q. I will ask you whether or not you recollect his being asked by the president of the council, before the question on the adoption of either of the ordinances was put, as to whether the company had anything to say on the subject of the passage of the ordinances?

Objection; objection sustained.

Mr. SMITH: I concede that Mr. Malley has testified that he was there.

Mr. HUBBARD (to the witness):

Q. Was there any claim for damages made on account of these improvements or either of them?

Objection.

Mr. SMITH: It is admitted that there was no claim, but it is admitted subject to our objection; but we don't think any of it is competent.

Received subject to objection, and exception taken.

To sustain the issues on its part the defendant offered as a witness—

Mr. STEINBERGER, who being first duly sworn, testified as follows:

Examination by Mr. HUBBARD:

Q. What, if any, official position do you hold in this city?
A. City civil engineer.
Q. How long have you been city civil engineer?
A. Nearly three years.
Q. Have you taken measurements of the depth, of the
69 distance from the top of the rail on the Wabash road here to the surface of the ground at the edge of the cutting at the crossing of the Brunersburg road, otherwise called Ralston avenue, and Holgate pike, otherwise called North Clinton street?
A. Yes, sir, I have.
Q. What is the height from the top of the rail to the surface at the edge of the cut?
A. Between ten and eleven feet.
Q. How is it as to the surface sloping from the edge of the cut back as you go back from the cut through which the railroad runs?
A. It slopes both ways from the track.
Q. Is it higher or lower as you come from the track?
A. It is lower.

Defendant rested.
No evidence given by the plaintiff in rebuttal.

And the above and foregoing being all of the evidence given or offered to be given by either and both parties to the suit, and the cause having been fully argued by counsel, was taken under advisement by the court, and afterward, on the second day of March, A. D. 1894, and during the said February term of court, the court announced its decision, finding the equities of the case with the defendant, to which decision and finding of the court the plaintiff duly excepted at the time and filed herein on said last-named day its motion for rehearing of this cause, which was overruled by the court, to which the plaintiff also excepted at the time, and thereupon, on the said 2d day of March, the court rendered its final decree and judgment against the said plaintiff, dismissing its petition herein, and for costs of suit.

To all of which rulings, orders, decisions, judgment and decree made and held against the plaintiff it duly excepted at the time and still now here excepts, and prays the court that its bill of exceptions be allowed and made a part of the record of this case, which is accordingly done on said 2d day of March, and during said February term of court in open court. And then came the plaintiff by its attorney, and produced to the court, this, its bill of exceptions, and prayed that the same might be signed and sealed by the court and ordered to be filed with the papers therein, all of which is

hereby done and ordered as of the said 2d day of March, A. D. 1894.

JOHN J. MOORE, [SEAL.]
HENRY W. SENEY, [SEAL.]
Judges of said Circuit Court.

70 STATE OF OHIO, } ss:
City of Columbus, }

I, Josiah B. Allen, clerk of the supreme court of Ohio, do hereby certify that the above and foregoing is a true and complete copy of the printed record filed in this case, No. 3965, The Wabash Railroad Company *vs.* The City of Defiance.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court this 26th day of February, A. D. 1895.

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

THE WABASH RAILROAD COMPANY } No. 3965 of the Supreme Court
vs. } of Ohio.
71 THE CITY OF DEFIANCE. }

To the honorable the Supreme Court of the United States of America:

In the matter of The Wabash Railroad Company, plaintiff in error, against The City of Defiance, defendant in error, hereby making return of the writ of error herein allowed to your honorable court, it is hereby and herein certified that the above and foregoing is a true and correct copy of all the proceedings had and done in the said cause by the said supreme court of the State of Ohio, including the original supersedeas bond taken and approved by the chief justice of said supreme court of the State of Ohio, and its final judgment therein rendered, and the syllabus prepared by the court in said case, the said supreme court of the State of Ohio not having as yet filed any opinion in the case, and also including a true and certified copy of the record on which the said case was finally heard by the said supreme Court of Ohio.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said supreme court of Ohio, at Columbus, this 26th day of February, A. D. 1895.

JOSIAH B. ALLEN, *Clerk*,
By GEO. H. KOLKER, *Deputy*.

72 [Endorsed:] In the Supreme Court of the United States. The Wabash Railroad Company, plaintiff in error, *vs.* The City of Defiance, defendant in error. Error to supreme court of the State of Ohio. Transcript of the record. Henry Newbegin, Co.'s counsel, defiance, O., attorney for pl'ff in error.

73 Error to the circuit court of Defiance county.

The original action was brought in the court of common pleas of Defiance county, by the Wabash Railroad Company, against the city of Defiance, to enjoin the defendant from proceeding with a contemplated improvement of North Clinton street, and Ralston avenue, by which those streets would be so graded as to necessitate the removal of the bridges erected by the plaintiff over its roadway where it crosses the streets, and also the approaches constructed by the plaintiff to those bridges.

The petition alleges that the plaintiff "is a corporation, duly organized under the laws of the State of Ohio, for the purpose of maintaining and operating a railway, and as such now owns and operates a line of railway through the city of Defiance. The defendant, The City of Defiance, is a municipal corporation of the State of Ohio, aforesaid. Said line of railway was formerly owned and operated by the Wabash, St. Louis & Pacific Railway Company, and during the years 1887, and 1888, was operated by one John McNulta, as receiver, appointed by the United States circuit court for the northern district of Ohio, western division, in a certain cause pending in said court, wherein James R. Jessup *et al.*, were complainants, and The Wabash, St. Louis & Pacific Railway Company *et al.*, were defendants; which suit had been instituted for the purpose of foreclosing the railway mortgages upon all the railway property of said Wabash, St. Louis & Pacific Railway Company. That in the year 1887, said line of railway crossed two certain public streets or highways in said city, known as the Holgate pike, and the Brunnersburg road, respectively, at a grade about eighteen feet below the grade of said streets, at the crossing of said railway and said streets; and that there were two overhead wooden bridges over the said line of railway at about the distance aforesaid above the track of said railway. And thereupon, on the 26th day of December, 1887,

74 the city council of said city of Defiance, duly passed an ordinance, in words and figures following, to wit:

'*An Ordinance*

'Permitting Wabash, St. Louis & Pacific railway to construct bridges at Holgate pike and Brunnersburg road.

'Be it ordained, by the council of the city of Defiance, Ohio:

'SECTION 1. That the Wabash, St. Louis & Pacific Railway Company is hereby authorized to erect new bridges over and across the track of the railway of said company where the same crosses the public streets in the Third ward of said city, known as the Brunnersburg road, and Holgate pike, provided said bridges shall be of good and substantial construction, placed in the center of said street, be eighteen feet wide roadway, with good and substantial sidewalk eight feet wide on each side of said bridges, with proper railings on each side of said walks, said bridges and sidewalks to be at all times kept in good order and repair by said company. And said railway company is hereby further authorized to construct each of said

bridges of sufficient height to give a distance of twenty-one feet in the clear between the tops of the rail of said railway at its present grade and the bottom of the floor beams of said bridges, provided always that said company shall provide and construct good and sufficient approaches and grade to each of said bridges, and extend the same to sufficient distance to give a grade of not to exceed one and one-fourth inches to the foot, and to conform to the width of the present street, said grade to be made firm and solid, by either stone or gravel, at the option of said company, provided that if gravel be used, said city will permit it to be taken from their gravel bed without charge, and to construct and keep in constant repair good and proper approaches to said sidewalks, and brought to the proper level of the present walk by broad, safe steps where the grade would be too great for a safe incline; and all to be done to the approval of the city, and all to be kept in repair to the extent of said company's right of way at all times by said company.

'SECTION 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said city as to either of said bridges.

'SECTION 3. This ordinance shall take effect and be in force from and after its passage and due publication.

'Done at the council chamber in regular session this 20th day of December, 1887.

'Attest: JAS. A. KITCHEL, *City Clerk.*

'I, Jas. A. Kitchel, do hereby certify that the foregoing ordinance was published in the Defiance Democrat, a paper of general circulation in said city and county.

'JAS. A. KITCHEL, *City Clerk.*'

"Said ordinance was duly published according to law. Said ordinance was passed for the purpose of allowing and permitting said McNulta, as receiver of said railway, to construct said bridges. And thereupon said McNulta, acting as receiver aforesaid, caused the overhead bridges described in said ordinance to be constructed, and as a part of said structures caused the necessary approaches to be constructed at a large cost and expense to said receivership, to wit: of more than $2,300.00. Said work was done under and by virtue of the authority of said ordinance and in all respects in conformity thereto; and all the terms and conditions imposed by said ordinance upon said railway and its receiver, have been faithfully kept and performed by him and by plaintiff since it was placed in possession of said railway property under the orders of said court as hereinafter stated. That thereafter said railway property was sold under the decree and orders of said United States court, and such proceedings were had as that plaintiff became the purchaser under said decree and orders, and under said orders became vested with all the said railway property and all rights, assets, choses in

action belonging to said receiver as such, including all rights arising under said ordinance and the acts of the receiver thereunder.

"And plaintiff says that on or about the 7th day of February, 1893, the city council of said city of Defiance, in utter disregard of the rights vested in said receiver and plaintiff by the foregoing ordinance and the action taken thereunder, and the orders and decrees of said court as above set forth, passed two ordinances in words and figures following, viz:

'*An Ordinance*

'To improve part of North Clinton street, in the city of Defiance, Ohio, and providing for the payment of the costs and expense of said improvement.

'Whereas, the city council of the city of Defiance, Ohio, at its meeting duly held at the council chamber in said city on the sixth day of September, A. D. 1892, duly passed and adopted a certain resolution declaring it necessary to improve part of North Clinton street, in said city, between the points hereinafter specified and in the manner hereinafter provided; and

'Whereas, due publication of said resolution has been made, and more than twenty days' written notice of the passage of said resolution has been given to each and all of the owners of property abutting on said improvement, in all respects as required by law and in conformity to said resolution; and

'Whereas, more than two weeks have elapsed since the service of said notice and the completion of said publication, and no claims for damages by reason of said improvement have been filed with the city clerk of said city. Now,

'Therefore, be it ordained by the city council of said city of Defiance, Ohio, as follows:

'SEC. 1. That the said improvement of that part of North Clinton street, formerly known as Center street and Holgate pike, in the city of Defiance, Ohio, which extends from the distance of twenty-five (25) feet north of the south line of the intersection of High street with said North Clinton street to the distance of nine hundred (900) feet north of said south line of said intersection of High street, be proceeded with, in accordance with said resolution, by changing the grade of that part of said street, and excavating and grading the same to the following grade, to wit: Com-
75 mencing at a point in the center of said North Clinton street, twenty-five (25) feet north of a point in the center of said street and in the south line of the intersection of High street therewith, at a distance of sixty-nine hundredths ($\frac{69}{100}$) of a foot lower than the water table on the store building of George Miller, and running thence north along the center of said North Clinton street, ascending at the rate of twenty-five hundredths ($\frac{25}{100}$) of a foot in each one hundred feet, for the distance of three hundred and twenty-five (325) feet; thence descending at the rate of four and fifty-hundredths (4 and $\frac{50}{100}$) feet in each one hundred feet, for the distance of two hundred (200) feet; thence at a level for the distance of fifty

(50) feet; thence ascending at a rate of four and forty-seven hundredths (4 and $\frac{47}{100}$) feet in each one hundred feet, for the distance of three hundred (300) feet, and there to terminate, in conformity to the profiles, plans and specifications on file in the office of the city civil engineer of said city, to which reference is hereby expressly had and made, and which said grade, plans, profiles and specifications are hereby approved, established, adopted and confirmed.

'SECTION 2. That the costs and expenses of said improvement shall be paid out of the general fund, and levied and assessed upon the general tax-list upon all real and personal property in the corporation.

'SECTION 3. This ordinance shall take effect and be in force from and after its passage and due publication.

'Passed February 7, 1893.

'EDWARD SQUIRE,
'*President of the Council.*

'Attest: J. J. MALLEY, *City Clerk.*

'THE STATE OF OHIO, } ss:
City of Defiance, }

'I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

'J. J. MALLEY, *City Clerk.*

'Defiance, Ohio, February 7, 1893.

'*An Ordinance*

'To improve part of Ralston avenue, in the city of Defiance, Ohio, and providing for the payment of costs and expense of said improvement.

'Whereas, the city council of the city of Defiance, Ohio, at its meeting duly held at the council chamber in said city, on the sixth day of September, A. D. 1892, duly passed and adopted a certain resolution declaring it necessary to improve a part of Ralston avenue, in said city, between the points hereinafter mentioned and in the manner herein provided;

'And whereas, due publication of said resolution has been made and more than twenty days' written notice of the passage of said resolution has been given to each and all of the owners of property abutting on said improvement, in all respects as required by law, and in conformity to said resolution;

'And whereas, more than two weeks have elapsed since the service of said notice and the completion of said publication, and no claims for damages by reason of said improvement have been filed with the city clerk of said city, now, therefore;

'Be it ordained, by the city council of Defiance, Ohio, as follows:

'SECTION 1. That the said improvement of that part of Ralston avenue, formerly known as the Brunersburg road, in the city of

Defiance, Ohio, which extends from its intersection with North Clinton street to a point six hundred (600) feet northwesterly from the center of said intersection, be proceeded with, in accordance with said resolution, by changing the grade of that part of said Ralston avenue, and excavating and grading the same to the following grade, to wit: Commencing at the center of the intersection of said Ralston avenue and North Clinton street, at the distance of six-hundredths ($\frac{6}{100}$) of a foot lower than the water table on the store building of George Miller, and running thence northwesterly along the center of said Ralston avenue, descending at the rate of five (5) feet in each one hundred feet, for the distance of two hundred (200) feet; thence on a level for the distance of fifty (50) feet; thence ascending at the rate of two and ninety-hundredths (2 and $\frac{90}{100}$) feet in each one hundred feet for the distance of three hundred and fifty (350) feet, and there to terminate, in conformity to the plans, profiles and specifications on file in the office of the city civil engineer of said city, to which reference is hereby expressly had and made, and which said grade, plans, profiles and specifications are hereby approved, established, adopted and confirmed.

'SECTION 2. That the costs and expenses of said improvement shall be paid out of the general fund, and levied and assessed upon the general tax-list on all real and personal property within the corporation.

'SECTION 3. This ordinance shall take effect and be in force from and after its passage and due publication.

'Passed February 7, 1893.

'EDWARD SQUIRE,
'*President of Council.*

'Attest: J. J. MALLEY, *City Clerk.*

'THE STATE OF OHIO, }
City of Defiance, } *ss:*

'I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

'J. J. MALLEY, *City Clerk.*

'Defiance, Ohio, February 7, 1893.'

"Said public highway known as Holgate pike being referred to in said last-named ordinances as North Clinton street, and said Brunnersburg road is referred to therein as Ralston avenue. That the sole purpose, object and effect of said ordinances is to cause the said overhead bridges and the approaches thereto over said Holgate pike and Brunnersburg road to be entirely destroyed and removed, and the crossing of said highways over said railway track reduced to a crossing at the same grade as plaintiff's said track. And said city of Defiance is now threatening and intending forthwith to destroy and remove said bridges and approaches. Plaintiff avers that if said city of Defiance be allowed to carry out said purpose, said crossings will be extremely dangerous to all persons having occasion to use the same by reason of the fact that the track of said railway

at said points is far below the ordinary level of the highways, and the roads as graded by said last-named ordinances will
76 approach said tracks at a steep downward incline on both sides; that said railway track at said points is on a heavy grade which renders it very difficult to control the speed of the heavy trains of plaintiff, and thus the danger of a grade crossing is vastly increased. The plaintiff says that for many years prior to the passage of said first-mentioned ordinance, to wit, since they *are* A. D. 1856 the railway track of the plaintiff had been crossed by said highways by overhead crossings consisting of bridges about eighteen feet in the clear above the level of the tracks. That said highways then, as now, crossed the railway track at points near together, to wit, about 196 feet and converge so as to meet at a distance of about 70 feet from the railway right of way. That the track of said railway at said crossings lies in a deep cut, about eleven or twelve feet below the natural surface of the ground, and is on a heavy down grade and curve, and on one of said highways buildings are so located as to almost, if not entirely, cut off the view of approaching trains from persons approaching said track from the southerly side of the same. That if said crossings are reduced to grade, as proposed by said ordinances, the approaches to said track will be down a steep incline plane on both sides of said track, on both said highways, so that at said crossings the said highways will be cut to a depth of about eleven and one-half feet below the adjacent lands. That it will be almost, if not quite impossible for heavily loaded teams to stop for trains when approaching said track; and that by reason of the deep cuts both of said railway and highways in which said crossings will be located and of the curve and grade of said railway at said points, the sound of any signal and the sound and sight of approaching trains will be cut off and said crossings will be excessively difficult and dangerous to the lives of persons crossing plaintiff's track along said highways, and to the lives, limbs, and property of its passengers and patrons, being carried on the trains of the plaintiff, on account of unavoidable accidents and collisions there happening, and that thereby there will be cast upon the plaintiff an additional burden and liability to its said passengers and the public. That the natural conformity of the land at said crossing is such as to make overhead bridge crossings of said public highways over plaintiff's said track absolutely essential to the public safety. That said crossings, since the construction of said track to the present time, for a period of time of about thirty-seven or thirty-eight years have been by means of overhead bridges at said public highways over the plaintiff's track, and at a height above said track of about eighteen feet, down to December, A. D. 1887, the date of the ordinance first hereinabove named when it became necessary for the safety and protection of the trains and trainmen of the plaintiff, on account of the increased height and size of the cars composing its trains, to raise said bridges to their present height, to wit, about twenty-one feet above plaintiff's said track, as was done by agreement with the said defendant under and by virtue of said ordinance first hereinabove

named. That at the time the said railway was constructed by the original railroad company incorporated under the laws of the State of Ohio, for that purpose, and to all whose rights and franchises this plaintiff has succeeded, said bridges were constructed as a part of the highways over said railway track in restoring of the said highways to their original usefulness, as said railroad company was required to do under the law; and said bridges have been kept up and maintained by said original railroad company and its successors, including this plaintiff, to the present time, as an integral part of said highways and as public crossings over its said track solely at the expense of this plaintiff and its said predecessors. That some time in the year A. D. 1878, the village council of the then village of Defiance, since organized as the city of Defiance, passed an ordinance requiring the Wabash Railway Company, a predecessor aforesaid of the plaintiff, to construct a sidewalk on one side of the said overhead bridge of the said Brunersburg road, there having been up to that time no sidewalks on either of said overhead bridges. That the said railway company objected and refused to do this, giving to the said village council as its reason therefor, that said bridge was a part of said Brunersburg road and which was a county road and under the entire and sole control of the county commissioners of said Defiance county. It was finally agreed between the said railway company and the said village of Defiance, that said railway company would construct a sidewalk on the left side of said bridge going northward on the express condition that it should not thereafter be considered as obligated to keep the same in repair or renew the same after that it had become unfit for use, to which the said village assented and the said railway company did so construct said sidewalk, but whether said agreement was reduced to an ordinance and entered on the records of said village, this plaintiff is ignorant; and this plaintiff says that by its requirement of the said railway company to construct said sidewalk at the height said bridge was over said track, the said village recognized the grade of said Brunersburg road as established at that height, and also by the ordinance first set forth herein the defendant recognized and agreed with this plaintiff that the grade of both of said highways was and should be thereby established and fixed at the height of twenty-one feet above the plaintiff's said track and that the defendant is thereby estopped from requiring this plaintiff to remove its said overhead bridges and to construct grade crossings of the said highways over its said track. That further the grading down of said highways as
77 proposed by said ordinances for that purpose will be an appropriation of the plaintiff's property, and will also cast an additional burden upon the plaintiff in the establishing and maintaining of new grade crossings over its said track, for which no compensation has been provided in money for the plaintiff, and no tender thereof made to the plaintiff; without which first being done the carrying out of said last-named ordinances will be contrary to the provisions of the constitution of the State. That said last-named ordinances are by reason of the premise- unreasonable, unlawful

dangerous and oppressive and contrary to sound public policy. Plaintiff further says that said last-named ordinances are contrary to public policy and void for the following reason, to wit: That they were passed as plaintiff is informed and believes, not for public benefit, but for private advantage of the owners of property lying adjacent to said bridges and approaches. That one Joseph Ralston is a member of the said city council of Defiance, and voted in favor of the said ordinances, and as plaintiff is informed, was highly instrumental in securing their adoption. And plaintiff says that said Ralston is the owner of a piece of property lying adjacent to said railway track on Ralston avenue, so called; that said Ralston, on or about the 3d day of March, 1890, recovered a judgment against said John McNulta, receiver, by the consideration of the court of common pleas of Defiance county, Ohio, in the sum of $431.25, which this plaintiff has paid in full, pursuant to an order subsequently made by the United States circuit court, northern district of Ohio, western division, in said foreclosure suit, as damages resulting to his premises from the elevation of said bridge on said highway under said first-named ordinance, and plaintiff charges on information and belief that in seeking and procuring the passage of said last-named ordinances, said Ralston intended to benefit his own property to the great damage of the general public, and to retain the damages paid him for the elevation of said roadway in front of his premises. Plaintiff alleges and charges the fact to be that said last-named ordinances, although in form ordinances to change the grade of the said streets, are in fact aimed solely at this plaintiff, and are intended simply to bring about the destruction and removal of said bridges and as such are an abuse of power on the part of said council, and that said ordinances are therefore contrary to the public policy and void. That if said defendant be allowed to carry out the provisions of said ordinances, this plaintiff will by reason of the premises suffer irreparable injury. Plaintiff further says that the ordinances last named of said city council of Defiance impair the obligation of the contract made by the city with said receiver in said first-named ordinance, and the acts of the said receiver and plaintiff thereunder; and as such are in contravention of the provisions of section ten (10), of article one (1), of the Constitution of the United States; but that, as your plaintiff is informed, and believes, said city and its officers and agents now give out and claim that said ordinance of 1887 is of no binding force or effect, and conferred no rights upon said receiver, and therefore affords no protection to plaintiff in the premises. This plaintiff further says that said Brunersburg road and said Holgate pike have been for a time long prior to the construction of the plaintiff's said railroad track continuously to the present time, and still are, State or county roads, and as such subject to the entire control of the board of county commissioners of said county of Defiance; that said overhead bridges, as above alleged, constitute an integral part of said public highways; that the defendant has no power or jurisdiction over the same so far as to interfere with the said overhead bridges of the plaintiff or to grade down or change

the grade of said highways, as contemplated by said last-nam ordinances; and that so far as said ordinances are intended change the grade of said highways or to interfere with the plai tiff's said bridges and crossings, they and each of them are abs lutely void.

"Second. Plaintiff further says, referring to the allegations herei before set forth as to the passage by the defendant and the inte and purpose of said last-named ordinances, and adopting said al gations as a part of this, its second cause of action, that it is t owner of a line of railway extending through the said city of De ance, and of other valuable property therein situated, all of whi is subject to the assessment and taxation therein; that it is purpos by the said defendant, if it carries into effect the provisions of the sa ordinances for the so-called improvement of said Ralston aven and North Clinton street, to assess the expense of said improvemer upon the property of the tax-payers of said city generally, and th the plaintiff thereby will have its said property charged wi taxes to pay for the expense of said proposed improvements; th the said Ralston avenue and North Clinton street are oth names merely for the said Brunersburg road and Holgate pik both of which are State and county roads and under the enti control and management of the board of county commissioners said Defiance county, and that all repairs and improvements of t same should be in law made at the expense of said county; that is not competent in law for the defendant to assess or tax the pro erty of the tax-payers, including this plaintiff, of the said city Defiance for the improvement and repairs of said public highwa in any sum whatever. Plaintiff therefore, having no adequate re edy at law, prays that the court will protect it in the enjoyme of all and singular, the rights and property transferred to it b said receiver, under the orders of said circuit court of the Unit

States; that said city of Defiance, its officers, agents and s

78 vants, may be enjoined from carrying said ordinances in effect, and from in any manner destroying or taking awa said overhead bridges and the approaches thereto. That, if nece sary to protect the plaintiff in its rights, said ordinances may vacated. That a provisional order of injunction be made restrai ing them from further proceedings thereunder, and on final hearin said order be made perpetual, and for such other and further reli as may be just and equitable in the premises."

The answer is as follows:

"Now comes the defendant, The City of Defiance, and admits a avers that it is a municipal corporation of the State of Ohio.

"It further admits that the plaintiff is a corporation, duly orga ized under the laws of the State of Ohio, for the purpose of mai taining and operating a railway, and that as such it now owns a operates a line of railway through said city of Defiance, which sa line of railway was formerly owned and operated by the Wabas St. Louis & Pacific Railway Company, and was, during the yea of 1887 and 1888, operated by one John McNulta, as receiver, a pointed by the United States circuit court for the northern distri

of Ohio, western division, in a certain cause then pending in said court, wherein James R. Jessup *et al.*, were complainants, and The Wabash, St. Louis & Pacific Railway Company *et al.*, were defendants; which suit had been instituted for the purpose of foreclosing the railway mortgages upon all the railway property of said Wabash, St. Louis & Pacific Railway Company.

"It further admits and avers that, in the year 1887, and for many years prior thereto, and ever since, the said line of railway crossed two certain public highways and streets in said city, one of which was then known as Holgate pike and is now known as North Clinton street, and so designated in the ordinance set forth in the petition, and the other of which was then known as the Brunersburg road, and is now known as Ralston avenue and so designated in the ordinance set forth in the petition, at a grade below the surface of said streets at the crossings of said railway and said streets, but denies that the track of said railway was more than sixteen feet below such surface of said streets, or either of them.

"And defendant further admits that there were then two overhead, wooden bridges over the line of said railway, but denies that they or either of them were any greater distance above said track than sixteen feet. It further admits that, since the year 1856, the track of said line of railway has been crossed by said highways by overhead crossings, consisting of bridges, but denies that at any time prior to the construction of the present bridges in the year 1887, said bridges were more than sixteen feet in the clear above the level of said track.

"It admits that said highways at all times since said year 1856, have crossed and now do cross said railway track at points about 196 feet from each other, and that they converge so as to meet at a distance of about seventy feet from the railway right of way.

"It admits that the track of said railway at said crossings lies in a cut, and is upon a curve, and that at the time that said railway was constructed by the original railroad company incorporated under the laws of the State of Ohio for that purpose, overhead bridges on said Holgate pike and the Brunersburg road, were constructed by said original railroad company as part of said public highways over and across said railway track, but it avers that said bridges were kept and maintained by said original railroad company and its successors for that purpose, at a height of not more than sixteen feet above the surface of the track of said railway, until some time prior to the year 1887, when the Wabash, St. Louis & Pacific Railway Company, or the said John McNulta, as receiver, as aforesaid, wrongfully removed said bridges, and in place thereof wrongfully and unlawfully constructed the present bridges, and raised said new bridges to the height of more than twenty-one feet above the surface of the track of said railway, and wrongfully and unlawfully raised the approaches to said last-mentioned bridges to correspond with the said increased height of said present bridges, and said Wabash, St. Louis & Pacific Railway Company and said receiver and said plaintiff have since kept up and maintained said bridges at said height of more than twenty-one feet above the surface of the

track of said railway, and have kept and maintained said approaches at the corresponding height.

"It admits that the said Holgate pike and the Brunersburg road were originally laid out, established and opened as county roads of the said county of Defiance, Ohio, and admits that at the time and for a long time after said original bridges were built as aforesaid, said highways were under the exclusive control of the board of county commissioners of said county, but it avers that, at the time of the removal of said bridges and the construction of the present bridges, and for a long time prior thereto, each of said highways, at its crossing and intersection of said railway, for a long distance on each side thereof, had become and was, and still is, within the territorial limits of said city of Defiance, and had become, and was and still is a public highway and street of said city, and within the exclusive care, supervision and control of the council of said city, and that neither of said present bridges is or ever became or was the property of said county of Defiance, or under the control of said county, or of the board of county commissioners thereof.

"And said defendant admits and avers that on the 7th day of February, A. D. 1893, the two ordinances mentioned and set forth in the petition and entitled, respectively, 'An ordinance to improve part of North Clinton street, in the city of Defiance, Ohio, and providing for the payment of the costs and expense of said improvement,'
79 and 'An ordinance to improve part of Ralston avenue, in the city of Defiance, Ohio, and providing for the payment of the costs and expense of said improvement,' were each passed by the city council of said city, and that each of said ordinances is in the words and figures set forth in said petition and that said defendant, unless restrained by the final order, judgment and decree of the court in this action, intends to and will construct said improvements in conformity to the terms and provisions of said several ordinances, and assess the expense of said improvements upon the property of the tax-payers of said city generally.

"And defendant further says, that the city council of said city of Defiance, at its regular meeting duly held at the council chamber in said city, on the sixth day of September, A. D. 1892, duly passed two certain resolutions, more than two-thirds of the whole number of members elected to said council concurring therein, which said resolutions are in the words and figures following, to wit:

'*A Resolution*

'Declaring it necessary to improve part of North Clinton street, in the city of Defiance, Ohio, between the points therein designated, and in the manner therein provided.

'Be it resolved, by the city council of the city of Defiance, Ohio, That it be and hereby is declared necessary to improve that part of North Clinton street, in said city, formerly known as Center street and Holgate pike, which extends from the dis-

tance of twenty-five (25) feet north of the south line of the intersection of High street with said North Clinton street, to the distance of nine hundred (900) feet north of said south line of said intersection of said High street, by changing the grade of that part of said street, and excavating and grading the same to the following grade, to wit: Commencing at a point in the center of said North Clinton street, twenty-five (25) feet north of a point in the center of said North Clinton street and in said south line of said intersection of High street, at the distance of sixty-nine hundredths ($\frac{69}{100}$) of a foot lower than the top of the water table on the store building of George Miller, and running thence north, along the center of said street, ascending at the rate of twenty-five hundredths ($\frac{25}{100}$) of a foot in each one hundred feet, for the distance of three hundred and twenty-five (325) feet; thence descending at the rate of four and fifty hundredths (4 and $\frac{50}{100}$) feet in each one hundred (100) feet, for the distance of two hundred (200) feet; thence at a level for the distance of fifty (50) feet; thence ascending at the rate of four and forty-seven hundredths (4 and $\frac{47}{100}$) feet, in each one hundred (100) feet, for the distance of three hundred (300) feet, and there to terminate, in conformity to the plans on file in the office of the city civil engineer.

'That the cost and expenses of said improvement shall be levied and assessed upon the tax-list, upon all real and personal property in the corporation.

'And that William E. Carpenter be, and he hereby is appointed to serve notice of the passage of this resolution on all owners of property abutting on said improvement; and the city clerk is hereby directed to cause this resolution to be published as required by law.

'Done at the council chamber in said city, this 6th day of September, 1892.

'H. D. BOKOP,
'*President pro Tem. of Council.*

'Attest: J. J. MALLEY, *City Clerk.*

'STATE OF OHIO, }
City of Defiance, } *ss:*

'I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

'J. J. MALLEY, *City Clerk.*

'Defiance, Ohio, September 14, 1892.

'*A Resolution*

'Declaring it necessary to improve part of Ralston avenue, in the city of Defiance, Ohio, between the points therein designated, and in the same manner therein provided.

'Be it resolved, by the city council of the city of Defiance, Ohio, That it is necessary to improve that part of Ralston avenue, in said

city, formerly known as the Brunnersburg road, which extends from its intersection with North Clinton street, to a point six hundred (600) feet northwesterly from the center of said intersection, by changing the grade of that part of said street, and excavating and grading the same to the following grade, to wit: Commencing at the center of the intersection of said Ralston avenue and North Clinton street, at a distance of six-hundredths ($\frac{6}{100}$) of a foot lower than the top of the water table on the store building of George Miller, and running thence northwesterly along the center of said Ralston avenue, descending at the rate of five (5) feet in each one hundred (100) feet, for the distance of two hundred (200) feet; thence on a level for the distance of (50) fifty feet, thence ascending at the rate of two and ninety-hundredths (2 and $\frac{90}{100}$) feet in each one hundred (100) feet, for the distance of three hundred and fifty (350) feet, and there to terminate, in conformity to the plans on file in the office of the city civil engineer.

'That the costs and expenses of said improvement shall be levied and assessed upon the tax-list, upon all taxable real and personal property, in said city.

'And that William E. Carpenter be, and he hereby is appointed and directed to serve notice of the passage of this resolution on all owners of property abutting on said improvement; and the city clerk is hereby directed to cause this resolution to be published as required by law.

'Done at the council chamber in said city, this 6th day of September, 1892.

'H. D. BOKOP,
'*President pro Tem. of Council.*

'Attest: J. J. MALLEY, *City Clerk.*

'THE STATE OF OHIO, } ss:
City of Defiance, }

'I do hereby certify that the foregoing is a true copy taken from the records and proceedings of said city council.

'J. J. MALLEY, *City Clerk.*

'Defiance, Ohio, September 14, 1892.'

"That both of said resolutions were duly published for two consecutive weeks in the Defiance Democrat, a newspaper published and of general circulation in said city of Defiance, beginning
80 on the — day of September, 1892, and written notice of the passage of each of said resolutions was duly served upon the plaintiff, on the 10th day of October, A. D. 1892, but the plaintiff did not, at any time, file any claim in writing with the clerk of said city, for damages by reason of said improvements, or either of them, by reason of which said failure to file such claim the said plaintiff has waived the same and is barred from claiming or receiving damages by reason of said improvements, or either of them.

"Said defendant further admits that one Joseph Ralston, at the

time of the passage of said ordinances was and still is a member of the council of said city of Defiance, Ohio, but it avers that said ordinances were passed by the vote in favor thereof of more than two-thirds of the number of all the members elected to said council exclusive of the vote of the said Joseph Ralston in favor thereof.

"And said defendant denies each and every matter, fact and thing, and each and every statement, allegation and averment in said petition contained, stated and set forth, and not hereinbefore expressly and specifically admitted to be true.

"Wherefore, having fully answered, said defendant prays that it may be dismissed hence with its costs."

The following is the reply:

"Said plaintiff in reply to the answer of defendant denies that the said public highways named in its petition ever became subject to the supervision and control of the defendant for other than police purposes."

Judgment having been rendered against the plaintiff on the trial of the issues in the court of common pleas, the cause was taken on appeal to the circuit court where the like judgment was rendered; and to reverse the latter judgment this proceeding in error is prosecuted. A bill of exceptions, containing the evidence, was duly taken in the circuit court, but it is not necessary to refer to it more particularly here.

The questions presented, and the facts, as far as they are deemed important in the decision of the case, are stated in the opinion.

Alex. L. Smith and Henry Newbegin, for plaintiff in error.

Wm. H. Hubbard and B. B. Kingsbury, for defendant in error.

WILLIAMS, *J.*:

Briefly stated, the propositions urged in argument in support of the plaintiff's claim to the relief it seeks, are: (1) That the council of the defendant had no jurisdiction over the streets in question, and therefore no authority to order their improvement, because they were originally parts of county roads; (2) that the improvement, if made in conformity with the ordinances of February 7, 1893, will involve the taking of the plaintiff's property, for which no compensation has been paid or tendered; and, (3) that by the ordinance of December 20, 1887, the plaintiff acquired the right to perpetually maintain the bridges as constructed over its roadway where it crosses the streets, and the improvement contemplated will, necessarily, be a violation of that right, which the plaintiff is entitled to prevent by injunction. These propositions may be conveniently considered in the order stated.

(1.) It appears from the uncontroverted allegations of the pleadings, that when the railway now operated by the plaintiff was constructed through the county of Defiance, the Brunersburg and Holgate roads were county roads leading into, and connecting with the streets of the incorporated village of Defiance, and were crossed by the railroad a short distance outside of the corporate limits of that village. The crossings were made by cutting through the

roadways and placing the railroad track about eighteen feet lower than their travelled surface. Wooden bridges were built over the track from one side of the cut to the other. Afterward, and before 1887, the corporate limits of the village were so extended, by the annexation of contiguous territory, as to embrace the portions of the highways mentioned, at and beyond the place where the railroad so crossed them; that portion of the Brunersburg road included in the annexation being since known as Ralston avenue, and the part of the Holgate road so included, as North Clinton street; to enjoin the improvement of which streets, by grading, under the ordinances of Feb'y 7, 1893, was the purpose of the plaintiff's action. While counsel for the plaintiff concede, that the parts of the county roads so brought within the defendant's corporate limits became highways of that municipality, they contend, it acquired control of them, in the language of the petition, "for police purposes only," by which we understand counsel to mean, that the defendant was without authority to improve them at all, or, if improved, the expenses should be paid by tax collected from the property of the whole county. This position is, we think, untenable. The highways, so brought within the corporate limits of the defendant, were removed from the control which the county commissioners theretofore
81 had over them, and became subject to the control, supervision, and care of the municipal authorities, like other streets and highways of the corporation. By express statutory provision, the council is given "the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges within the corporation," and is charged with the duty of causing "the same to be kept open and in repair, and free from nuisance." Section 2640, Revised Statutes. The duty thus devolved upon the council is attended with the power to do whatever may be necessary in the proper and lawful performance of the duty, including the power to improve such ways, or parts thereof, in any lawful manner, when, and as, the public convenience may demand. Grading a street, and changing its grade, when necessary for its convenient use by the public, are lawful modes of improving the street, and keeping the same open and in repair. Smith *v.* Washington, 20 How. 135. Our statutes have conferred the power to make such improvements, upon all municipal corporations, and authorized the costs and expenses thereof to be assessed upon all the taxable property within the corporation, as is provided by the ordinances of February 7, 1893, for the improvement of the streets in question. Revised Statutes, sections 1692, 2263, 2301. And the exercise of such power has been repeatedly recognized and upheld by this court. Cincinnati *v.* Penny, 21 Ohio St. 499; Youngstown *v.* Moore, 30 Ohio St. 133; Akron *v.* Chamberlain, 34 Ohio St. 328; Cincinnati *v.* Whetston, 47 Ohio St. 196; Cincinnati — Sherike, *ibid.* 218. The bridges over the plaintiff's railroad where it crosses the two streets referred to, are parts of those streets, substitutes for the soil taken out in making the cut for the railroad crossings, and, like other parts of the streets, are within the control of the municipal authorities of the defendant. Beach on Pub. Corp. 1470.

But it is claimed, that notwithstanding the corporate boundaries of the defendant were so enlarged as to embrace those portions of the county roads sought to be improved, the exclusive jurisdiction and control of the county commissioners over them is preserved by section 4906, of the Revised Statutes, which provides that: "The commissioners shall keep in repair such portion of such roads within their respective counties as have since their completion been included, or may hereafter be included, within the corporate limits of any city or village in such counties, to points therein where the sidewalks have been curbed and guttered, and no further." This section is a part of the chapter of the Revised Statutes relating to the repair of improved roads, and the "such roads," therein referred to, are those mentioned in section 4876, viz: "McAdamized or graveled roads, which are free roads constructed under general or local laws by taxation or assessment, or both, or converted from a toll road into a free road, and turnpike roads or parts thereof unfinished or abandoned by the company and appropriated or accepted by the commissioners of the county." The plaintiff's petition does not allege, nor does it otherwise appear that either of the county roads, or any portion of either taken into the corporate limits of the defendant, belongs to any of the above-mentioned classes of highways; the contrary is shown by the plaintiff's evidence. It is quite clear, therefore, that section 4906 has no application to the roads involved in this case; and, where applicable, it has no other effect than to cast on the commissioners the burden of keeping the roads to which it relates in repair, until otherwise improved by the city or village, and does not exclude the power of the municipal authorities to improve them at their discretion.

2. That the taking of private property for a public use, without compensation to the owner, is distinctly forbidden by the constitution of this State, is not doubted. Precisely what property of the plaintiff will be taken in making the improvements entered upon by the defendant, is not so clear. The plaintiff's roadway is in nowise disturbed, but remains as it was originally constructed; its franchises are not abridged or affected; nor, can it be claimed that it will be deprived of any of its tangible property, unless it be the bridges, whose removal becomes necessary in the construction of the improvements. It certainly has no proprietary interest in the approaches to the bridges, consisting of fills made in the streets, and devoted to the public use, when placed there; no private ownership in the soil so placed, remained in the plaintiff, nor did the labor or expense of placing it there give the plaintiff any property right in the streets. If it be held that the bridges are not in exactly the same category, but are the property of the plaintiff, it is not shown that they, or the material in them were, or will
82 be appropriated by the defendant, or the plaintiff otherwise deprived of them; nor, does it appear that any other property of the plaintiff will be taken by the contemplated grading of the streets. With respect to the plaintiff's road and right of way on either side of the streets, and its property in the bridges, the most that can be claimed for it is, that the plaintiff is the owner of prop-

erty abutting on the streets, and, like other abutting owners, has an easement in the streets, appendant to its property. If so, its rights are not different from those of other proprietors whose property abuts upon the streets. The rights of such owners are well defined. Since the case of Crawford *v.* Deleware, 7 Ohio St. 460, it has been the settled law of this State, that the owner of an unimproved lot, or of unimproved land abutting upon a street, is not entitled to compensation or damages from the municipality for grading the street, because he is presumed to have acquired his property subject to the right to make all reasonable and proper improvements of the street; nor, where he improves his lot or land before the grade of the street has been established, is he entitled to compensation or damages for a subsequent reasonable and proper grading of the street, unless he used due care to make his improvement with reference to the establishment of such a grade; but, when his improvement has been made in accordance with an established grade which is afterward changed, he is entitled to compensation for the injury resulting therefrom. Railway *v.* Cumminsville, 14 Ohio St. 523; Cincinnati *v.* Penny, 21 Ohio St. 499; Youngstown *v.* Moore, 30 Ohio St. 133. In addition to the fact, that when the plaintiff's railroad was originally constructed across what are now known as Ralston avenue, and North Clinton street, they were, at the places of crossing, county roads outside of the corporate boundaries of the defendant, the record discloses that no grade of either had been established, nor was any building erected or other improvement made on the plaintiff's property, on either side of either of those roads, nor was any constructed thereon before the passage of the ordinance of December 20, 1887; and none has been since that time; but the property of the plaintiff has remained, and still is in the same condition, in these respects, that it was when the *the* crossings were first made; so that, conceding the ordinance, and the construction of the bridges under it, had the effect, so far as the plaintiff's rights are concerned, of establishing the grades of those streets at the places of their intersection with the railroad, in accordance with the location of the bridges, it cannot be claimed, and is not, as we understand, that plaintiff improved its property with reference to such grade, or any established grade, or made any change in its condition on account of the ordinance, except to build the bridges and approaches. But, however that may be, to whatever extent the plaintiff's property will be taken, or its rights invaded, or injury be sustained by the making of the contemplated grade, for which the plaintiff may lawfully claim compensation, ample provision is made by the law under which the proceeding was instituted, whereby the plaintiff might have had full compensation and damages assessed in the mode required by the constitution. It is shown by the allegations of the answer, not denied by the reply, and therefore admitted, that the council of the defendant, in conformity with section 2304, of the Revised Statutes, duly declared, by resolution, the necessity of the proposed improvement, and gave the plaintiff the requisite twenty days' written notice of its passage, and published the resolution for the length of time, and in the manner required by that

section; and, it is further shown that the plaintiff filed no claim whatever for compensation or damages. Section 2315, makes it necessary for persons who claim they "will sustain damages by reason of the improvement," to file their claim therefor, with the clerk of the corporation, within two weeks "after the service, or completion of the publication of the notice mentioned in section 2304," and contains the further provision, that persons who fail to so file their claim "shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages." The statute then provides that, at the expiration of the time limited for filing claims for damages, the council shall determine whether it will proceed with the improvement or not; also whether the claims for damages filed shall be judicially inquired into before commencing the improvement, or after its completion. Section 2316. And when the council determine to go on with the improvement, provision is made for empaneling a jury either in the court of common pleas, or probate court, to inquire into, and assess the dam-
83 ages, either before the improvement is commenced, or after its completion, as the council may determine; but such inquiry and assessment shall be confined to the claims which have been filed as above stated. Sections 2317, 2318. These statutes have been in force and acted upon for many years, and we are not aware their constitutionality has been called in question. Similar provisions in the county and township road laws, in regard to the waiver of the right to compensation for property taken, by failure of the owner to file his claim in writing with the viewers, have been held constitutional by this court. Reckner *v.* Warner, 22 Ohio St. 275; Anderson *v.* McKinney, 24 Ohio St. 467; Frevert *v.* Finefrock, 31 Ohio St. 621. The principle of the cases cited, is applicable to the street improvement statutes we have referred to, and under them the plaintiff's claim to compensation, if any it had, was waived and barred by the failure to file it within the time required. The plaintiff is charged with knowledge of the law, and, in the absence of any showing to the contrary, must be presumed to have voluntarily withheld its claim for compensation and damages, and thus prevented an inquiry into, and assessment of them; and it seems clear, that an owner who has been afforded an opportunity of having compensation and damages assessed him, in the constitutional mode, for property taken or injured in the making of a street improvement, and has failed to avail himself of that opportunity, cannot, after having thus waived his right, enjoin the improvement on the ground that compensation has not been paid or tendered him.

3. After the adoption, by the defendant, of the ordinance of December 20, 1887, the receiver then having charge of the railroad now owned by the plaintiff, constructed the bridges over the railway track where it crosses the streets named in the ordinance, in accordance with its requirements, whereby it is claimed, a contract arose between the defendant and receiver, the benefits and burdens of which have passed to the plaintiff, under which the plaintiff is entitled to perpetually maintain, and have maintained, the bridges

open, in repair, and free from nuisance; nor, does it purport to obligate the defendant to abstain from the lawful exercise of its powers to make further improvements of the streets as the public interest may from time to time demand. The obvious purpose in granting the permission to put up the new bridges, was to preserve and promote the free and unobstructed use of the streets by the public, and not to destroy them as public thoroughfares, or invest the railroad company with an interest in, or control over them, nor to enable the company forever and unalterably to maintain the bridges as put up. True, the ordinance imposes the burden upon the company "at all times" to keep the bridges and approaches in repair, but that must mean, at all times while the *the* proper performance of the defendant's statutory duties with respect to the streets permits them to remain; and when removed in consequence of an
85 improvement of the street, the company will of course be relieved of the burden. It is not apparent that the expenditure of money and labor in the construction of the bridges, as a condition or consideration for the privilege of placing them in the street, can give rise to any legal right or consequence different from what would result from the like expenditure in putting a street, where a railroad crosses it at grade, in a condition to preserve its usefulness as such; and it would hardly be claimed in the latter case, that the municipality having jurisdiction over the street, would be disabled from so improving it as to necessitate an overhead, instead of a grade crossing, notwithstanding it had previously authorized the grade crossing to be made, or to be raised or lowered after it was made. In either case, the public use continues to be the dominant interest in the street, and the crossing subject to such changes, necessary to subserve that interest, as the proper officers of the municipality may choose to make, in the exercise of their statutory powers, which do not defeat those uses of the crossing by the railroad company that are necessary in the prosecution of its business. We are aware the petition of the plaintiff alleges that overhead crossings, substantially as they now exist over its track in these streets, are absolutely essential to the safe use of the railroad at those places. But this allegation is denied by the answer, and the issue of fact was found against the plaintiff by the court below. We are not required to examine the evidence to ascertain whether it sustains the finding; but it is apparent the most that can be said in support of this claim of the plaintiff is, that the contemplated grade crossings may require greater care on its part in operating its road, as it also may on the part of the persons using them, and thus subject it to some inconveniences, and if negligent, to losses. It is well known, however, that very many railroad crossings are of that kind, and roads are extensively operated over them in numerous instances, in populous cities where great numbers of trains, people, and vehicles pass daily, and have been since the use of railroads began; and the inconveniences to which plaintiff may be subjected on account of the change in the character of the crossings, cannot deprive the defendant of its right, or absolve it from its duty to cause needed improvements of the streets to be make. Middlesex Railroad Co.

v. Wakefield, 103 Mass. 263; C., B. & Q. R. R. Co. *v.* Quincy, 136 Ill., 563. The comparative safety of overhead and grade crossings, and the increased dangers which would arise from the making of the proposed improvement of the streets, were important matters for the consideration of the members of the council in determining whether the ordinances providing therefor, should be adopted; and it must be presumed they received full and fair consideration, and candid decision. Recent tendency is undoubtedly in the direction of abolishing grade crossings, as far as practicable, and that tendency deserves encouragement; but, that they must continue to be used, in many, if not most instances, is quite probable, and in some instances are the only practicable and available kind of crossing. In behalf of the action of the defendant in this case, it is claimed that the elevation made in the streets by the increased height of the bridges, renders travel, and traffic with loaded vehicles, over them so difficult that they constitute substantial obstructions of the streets, which, together with the growth in population of the defendant and the surrounding vicinity, require the changes proposed by the ordinances, in order to meet the present public necessities in the uses of the streets. The relative public benefits and private disadvantages that might result, called for the best judgment of the members of the council, and their decision, when not transcending their powers, or induced by fraud, is beyond the control of the courts. The proper interpretation of our statutes, therefore, require us to hold, that the defendant was without authority to yield the control of the streets, by ordinance, or otherwise, to the railroad company, or relinquish or restrict any of its powers with respect to the improvement of them, or discharge itself from any of its statutory duties concerning them. And, aside from the want of authority to accomplish such result, we are convinced the ordinance of December 20, 1887, has not the operation claimed for it by the plaintiff. The agreement, if one arose from its acceptance, was not one made "in the location" of the railroad in the defendant's streets, as to "the manner, terms, and conditions upon which the same might be used or occupied" by the railroad, for it had long before that been located and constructed, and still remains unchanged, and unmolested
as originally located and constructed; nor, can it be regarded
86 as an agreement upon terms, etc., for the right of further occupancy and use of the streets, because that was unnecessary, the right existing in virtue of the original construction of the road; nor, what is more important, does the ordinance relate to the use or occupancy of the streets by the railroad, but rather to the keeping of the streets in a condition to preserve their usefulness as public thoroughfares. The agreement, therefore, is not within the purview of section 3283, but is more appropriately referable to the succeeding section (3284), which requires a railroad company whose road crosses a public highway to put the latter in a condition that it will not impair its usefulness as such. This provision, it seems, is substantially the common-law rule on the subject, which, it is held, imposes the duty upon a railroad company constructing its road across a public highway, to restore, or reunite the highway at

its own expense, by reasonably safe and convenient means of passage, although the charter or statute authorizing the construction of the railroad contains no express provision to that effect; and the duty so imposed, has reference to future contingencies, and requires the company, from time to time, to put the highway in such condition as changed circumstances may render necessary. State *v.* Railway Co., 35 Minn., 131.

Again, when the ordinance was passed, those statutory provisions were in force which invest the legislative bodies of municipal corporations with the entire control of the streets, and confer upon them power to make improvements thereof from time to time in the public interest, by grading, etc.; and persons, and corporations contracting with the municipal authorities, must be presumed to contract with reference to the obligations and duties arising under those laws, and subject to the consequences resulting from their operation and enforcement. Impliedly, they enter into and become a part of such contracts, as much so as if embodied therein, and such is the presumed intention of the parties. When, therefore, those laws are put into operation, it cannot be said that the obligation of the contract is impaired, but rather that full effect is given to the contract according to its true scope and intent. Smith *v.* Parsons, 1 Ohio, 236; Weil *v.* State, 46 Ohio St., 450. "The obligation of a contract," says Judge Cooley, in his work on Constitutional Limitations, page 345, "depends on the laws in existence when it was made; these are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by one party, and the right acquired by the other." And in the application of the rule to a case analogous to the one before us, it is said by the supreme court of Illinois, in the opinion by Scholfield, C. J.: "It cannot be said that the right of the railroad company granted by the deed of the city is impaired by this improvement, for the reason that the grant is subject, by implication, to the exercise of this power by the city, for such grants are construed strictly as against the railroad company, and liberally in favor of the public, and nothing can therefore be implied in favor of the grantee, beyond the express letter of the grant, unless it shall be indispensable to give effect to the grant, (Railroad Co. *v.* Chicago, 12 Ill. 176; Railroad Co. *v.* City of Belleville, 122 Ill. 376, 12 N. E. R. 680), and it is not indispensable to give effect to this grant that the city shall have no right to improve the parts of the street upon which appellant's tracks are laid. The fact that the railroad company agreed to so grade the streets and so lay the railroad tracks that carriages, wagons, etc., may conveniently cross the same, does not deprive the city of its power, nor absolve it from the duty, to keep the street in a safe proper condition." C., B. & Q. R. R. Co. *v.* Quincy, 139 Ill. 355.

In our opinion, the ordinance of December 20, 1887, constitutes no valid objection to the improvements which the counsel of the defendant, by the ordinances of February 7, 1893, ordered to be made. It is suggested this conclusion is in conflict with the cases of The Railway Company *v.* Carthage, 36 Ohio St. 631, and the Phila. W. & B. R. R. Co.'s Appeal, 121 Pa. St. 44. But we think not. In

the first of those cases the contract was made at the time of the location of the railroad, and was an agreement in regard to the terms on which the railroad might occupy the streets of the village, and was, therefore, strictly within section 3283, of the Revised Statutes; and, it is especially to be noticed, that under such an agreement, the power of the municipal authorities to improve the streets, notwithstanding the location of the railroad in them, while not involved in the action, is recognized by the court in the opinion.

87 In the Pennsylvania case, the city of Chester, under a special act of the legislature authorizing it to do so, entered into a contract with the railroad company to establish the grade of a street about to be opened, eighteen feet above the railroad track, and the company agreed to construct a bridge over the track. The act declared that the contract when made, should be as valid and effectual to transfer the rights and privileges therein contracted for to the railroad company, as if made between individuals; and it further authorized the company to maintain its bridge so long as the street remained open. In the decision of the case, stress is placed on these provisions, the first of which put the contract on the same footing as agreements between individuals, and took it out of that general rule applicable to agreements of municipal bodies which leaves them at liberty to exercise their legislative powers whenever necessary for public purposes, and the latter expressly fixed the duration of the contract, which, having been made in execution of the power conferred by the statute, was intended to be as comprehensive as the statute permitted. Both cases are essentially different from the one before us.

4. A question is made on the competency of testimony offered by the plaintiff, which the court excluded, consisting first, of the opinions of witnesses in regard to the dangers which would, or might ensue in operating the railroad, if the ordinances of February 7, 1893, should be carried into effect; and second, the oral discussions of members of the defendant's council, while the ordinances were under consideration by that body. As an example of the first, an expert engineer, who had fully testified to the condition of the crossings, their situations and surroundings, was asked "What would be the effect upon the business of the company, and its relations to the public, if the ordinances of 1893 were carried into effect?" We think the opinion called for by the question is somewhat beyond the range of expert testimony. This witness, and others were also asked to give an opinion as to whether the crossings could be made safe for the public and railroad employés, if the grades were made as the ordinances required; and other questions were put, varying in form, to obtain opinions on the same subject. The trial was to the court, and the extent to which such testimony should be received and considered, was largely in its discretion. We must assume the court gave due consideration to the facts proven, and the opinions of witnesses might, or not, aid the court in arriving at a correct decision upon the issues of the case. The average individual possessed of all the facts, would be competent to form a conclusion in regard

to the dangers of the crossings, unaided by the opinions of persons experienced in operating railroads. The exclusion of this testimony, and of the arguments advanced by members of the council for or against the passage of the ordinances, is not of sufficient consequence to require the reversal of the judgment. If competent, and we do not say it was, it is not apparent that the plaintiff was prejudiced by its exclusion. The final action of the council in the adoption of the ordinances, gave them their validity; and the vote on their adoption was the exercise, by the members of that body, of their deliberate judgment, after all the consideration they had given the subject. Of the necessity or expediency of the improvements thereby directed to be made, they were the sole judges, and in the absence of fraud, their determination upon those questions cannot be judicially revived. Dillon on Mun. Corp., secs. 94, 95, 686; Beach on Pub. Corp., secs. 1205, 1112, 1118.

The petition of the plaintiff contains a charge of fraud, but that, having been put in issue, appears to have been abandoned at the trial, as no evidence was offered to sustain it, and the trial court found against it; and the making of improvements, of the nature provided for by the ordinances, was, as we have seen, within *in* the statutory powers of the counsel. After a careful examination, we have discovered no error in the record, which warrants the reversal of the judgment below.

Judgment affirmed.

88 In the Supreme Court of the United States.

THE WABASH RAILROAD COMPANY, Plaintiff in Error,
vs.
THE CITY OF DEFIANCE, Defendant in Error.

No. 927, of Oct. Term, A. D. 1894.

Whereas, at the time the record in this cause was certified into the said Supreme Court of the United States by the clerk of the supreme court of Ohio, there was not included in said record the opinion of the said supreme court of Ohio, for the reason that the same had not then been written, it is hereby agreed by the parties hereto that the foregoing is a true copy of said opinion, and that the same be printed as a part of the record of the case under paragraph 2, rule 8, of the court, the same to be printed immediately after the official syllabus of the said supreme court of Ohio, now included in the transcript of the record; but this agreement is not to be printed or included as a part of the printed record.

HENRY NEWBEGIN,
Attorney for Plaintiff in Error.
W. H. HUBBARD,
Att'y for Defendant.

Dated this Jan'y 27th, 1896.

89 [Endorsed:] Case No. 15,811. Supreme Court U. S., October term, 1895. Term No., 543. The Wabash Railroad Company, pl'ff in error, *vs.* The City of Defiance. Stipulation and addition to record. Filed January 29, '96.

Endorsed on cover: Case No. 15,811. Ohio supreme court. Term No., 543. The Wabash Railroad Company, plaintiff in error, *vs.* The City of Defiance. Filed March 2nd, 1895.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1896.

No. 239.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CITY OF DEFIANCE,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR,

BY

HENRY NEWBEGIN.

ALEX. L. SMITH,
Of Counsel.

Printed by the Chicago Legal News Co.

In the Supreme Court of the United States.

WABASH RAILROAD COMPANY,
Plaintiff in Error,
against
THE CITY OF DEFIANCE,
Defendant in Error.

No. 239 OF OCT. TERM, 1896.

Brief of Plaintiff in Error.

Statement of Facts.

In the year 1855, the railroad company, to whose rights, franchises and property the plaintiff in error has succeeded, had constructed its line of railroad and opened it for traffic from Toledo to the village of Defiance, through the county of Defiance, and thence westward.

Its right of way and track crossed two public highways northeast of the Maumee river, near said village—Holgate Pike and the Brunersburgh Road (the latter being the most westerly)—distant from each other about 196 feet, and converging so as to meet at a distance of about seventy feet from the railway's right of way on the south. In constructing the railroad line a deep cut was made at and between these highway crossings from eleven to twelve feet in depth; two or three hundred feet westerly of these crossings the railroad curved to the south at "about a four-degree curve," and for a distance of two or three miles from the east under these highway crossings through the curve to the river the railroad track was on a down grade of about twenty-six feet to the mile.

In restoring these highways to their former usefulness, as the railroad company was required to do under the law of Ohio (R. S. of Ohio, Sec. 3284), overhead bridges were constructed over the rail-

road track, distant from it in the clear, at first about sixteen feet, and afterward, until the year 1887, sixteen feet and ten inches.

After the construction of said railroad, some time prior to the year 1876, the territory where the said highways crossed the railroad had been brought into the limits of said village, and continuously thence to the time of the beginning of this suit, the same has been within the territorial limits of the said village and city of Defiance. [Printed record, page 65.]

About the year 1880, said village was organized into a city, under the name of the said defendant, and the defendant succeeded to all its (said village's) rights and liabilities, since which time said Brunersburgh Road has been called and known as Ralston Avenue, and said Holgate Pike as North Clinton Street.

At the time said overhead bridge-crossings were constructed over the railroad track, no sidewalk was constructed to either of said bridges, nor was the company required to make sidewalk-crossings over its track, and the approaches to each of the said overhead bridge-crossings was of the width only of the traveled public highway, and neither of said highways at its approach to said crossings had any sidewalk.

In the year 1876 the then village of Defiance wished a sidewalk or footbridge constructed over the track of the railroad company, then the Toledo, Wabash & Western Ry. Co., at the Holgate Pike crossing, and entered into an agreement with the said railroad company, which was embodied in an ordinance passed September 10, 1876, in substance that said sidewalk or footbridge should be erected to join the overhead bridge of said railroad company over said Holgate Pike at the same distance from the company's railroad track in the clear as the said highway bridge-crossing. It was further agreed

"that the said village of Defiance should forever keep and maintain "said footbridge in safe condition and good repair, and at its (said vil-"lage's) own cost and expense."

It was further agreed by said ordinance that the construction and maintenance of said footbridge or sidewalk should be subject to the inspection and approval of the railroad company's engineer; should "be built and renewed and repaired from time to time as "directed by said engineer, at the expense of the said village of De-

"fiance; and that the said village would be forever and absolutely re-
"sponsible for the safe repair and maintenance of said footbridge."

All of which conditions the said village of Defiance agreed to conform to as long as it desired to keep and use a walk across the railway at said Holgate Pike crossing (see printed record p. 45). The said village did immediately thereafter and during the month of September, 1876, construct the said sidewalk at the overhead bridge-crossing and the public continually used the same as a sidewalk over said railroad crossing down to the year 1887.

In the year 1887 the railroad company (then the Wabash, St. Louis and Pacific Ry. Co. operated by a receiver), in order to prevent accidents and protect the lives and limbs of their trainmen, decided to elevate said overhead bridges crossing their track, and for that purpose applied to the council of the said city of Defiance for authority so to do. Which authority was granted by the city, the defendant herein, by its ordinance passed December 20, 1887, by which the said railroad company was authorized to raise and construct each of its said bridges

"of sufficient height to give a distance of twenty-one feet in the clear
"between the top of the rail of the said railway at its present grade
"and the bottom of the floor-beams of said bridges;"

upon the express conditions that said bridges should

"Be of 18 feet roadway with good and substantial sidewalks eight
"feet in width on each side of each of said bridges with proper rail-
"ings on each side of said walks. Said bridges and sidewalks to be at
"all times kept in good order and repair by said (railway) company."
That the company should "provide and construct good and sufficient
"approaches and grades to each of said bridges and extend the same
"to sufficient distance to give a grade of not to exceed one and one-
"fourth inches to the foot and to conform to the width of the present
"street; said grade to be made firm and solid by either stone or gravel
"at the option of the said company." The railroad company was further required "to construct and to keep in constant repair, good
"and proper approaches to said sidewalks brought to the proper
"level of the present walk by broad, safe steps where the grade would
"be too great for a safe incline; all to be done to the approval of the
"city and all to be kept in repair to the extent of said company's
"right of way at all times by said company."

"The entering upon the work of constructing said bridges by
"said company shall be taken as an acceptance of the terms thereof
"by said company, and shall be regarded as superseding any contract
"or agreement heretofore existing between said company and said city
"as to either of said bridges." [See Record, pages 46 and 47 and 9 and 10.]

The railroad company did at once elevate their said highway crossings and constructed new overhead bridges and sidewalks, with approaches and grades on both sides of said bridges, all in accordance with the terms of said contract with the city, and completed the same in February, 1888, at the expense of $2,456 [see testimony of Mr. Danes, Record pp. 37 and 38], and have maintained and kept the same in repair, and the same have been in continuous use by the public down to the time of the commencement of this suit.

On February 7, 1893, the said defendant, the city of Defiance, passed the ordinances complained of herein, nominally for the improvement of said Ralston avenue and North Clinton street [see printed Record pp. 11, 13 and 20] by the grading of the same down to a level with the track of the said company's railway at each of the said street crossings, and thereby to remove and destroy the said overhead bridge-crossings and approaches thereto over the plaintiff's railway track.

Both ordinances are alike in substance, a copy of one is as follows:

Be it ordained by the City Council of Defiance, Ohio, as follows:

"SECTION 1. That the said improvement of that part of Ralston avenue, formerly known as the Brunersburg road, in the city of Defiance, Ohio, which extends from its intersection with North Clinton street to a point six hundred (600) feet northwesterly from the center of said intersection, be proceeded with in accordance with said resolution, by changing the grade of that part of said Ralston avenue, and excavating and grading the same to the following grade, to wit: Commencing at the center of the intersection of said Ralston avenue and North Clinton street, at the distance of six-hundredths ($\frac{6}{100}$) of a foot lower than the water table on the store building of George Miller, and running thence northwesterly along the center of said Ralston avenue, descending at the rate of five (5) feet in each one hundred feet, for the distance of two hundred (200) feet; thence on a level for a distance of fifty (50) feet; thence ascending at the rate of two and ninety-hundredths ($2\frac{90}{100}$) feet in each one hundred feet for the distance of three hundred and fifty (350) feet, and there to terminate, in conformity to the plans, profiles and specifications on file in the office of the city civil engineer of said city, to which reference is hereby expressly had and made, and which said grade, plans, profiles and specifications, are hereby approved, established, adopted and confirmed."

"SECTION 2. That the costs and expenses of said improvement shall be paid out of the general fund, and levied and assessed upon the general tax-list on all real and personal property within the corporation."

"SECTION 3. This ordinance shall take effect and be in force from and after its passage and due publication."

"Passed February 7, 1893."

If these ordinances were enforced the effect would be that each street, would be cut down on either side from the surface of the ground at the crossing, approaching it on a down grade of four feet and a half, or five feet in a hundred, to the grade of the track which it would cross on a level of fifty feet, twenty-five feet on either side of the center of the railroad track; the street thus being in a cut increasing from the surface of the ground to the railway track, where it would be of a depth of about twelve feet. [The testimony of Mr. Woodward, bottom of p. 32 and top of p. 33, in printed record, and of Mr. Gould, p. 34, is undisputed on this point; see also the ordinances.]

To prevent the enforcing of these ordinances, and the consequent destruction of the said overhead highway crossings and the reducing of the same to grade crossings, the plaintiff, on March 2, 1893, brought suit, by filing its petition in the court of Common Pleas of Defiance County, Ohio, setting up therein the substance of the facts above stated, and especially setting up the said ordinance of the said city of Defiance, of 1887, by which, for the consideration therein named, the plaintiff had been licensed and authorized to construct said overhead bridge-crossings, at a height of twenty-one feet above its track, and the grades and approaches thereto. Among other things, it especially charged in said petition that by the said ordinances:

"The defendant recognized and agreed with this plaintiff that "the grade of both of said highways was and should be thereby established and fixed at the height of twenty-one feet above the plaintiff's "said track, and that the defendant is thereby estopped from requiring this plaintiff to remove its said overhead bridges and to construct "grade crossings of said highways over its said track. That further "the grading down of said highways as proposed by the said ordinances for that purpose will be an appropriation of the plaintiff's "property, and will also cast an additional burden upon the plaintiff "in the establishing and maintaining of new grade crossings over its "said track, for which no compensation has been provided in money "for the plaintiff, and no tender thereof made to the plaintiff."

And further it charged in substance that said ordinances, though in form to change the grade of said streets were, in fact, solely aimed at the plaintiff and passed solely with the purpose of destroying and

causing to be removed the said overhead bridge crossings, and that as such they were an abuse of power on the part of the said city council and void. The plaintiff further specially charged in said petition:

"That the ordinances last named of said city council of Defiance "impair the obligation of the contract made by the city with said re- "ceiver in said first named ordinance, * * * and as such are in "contravention of the provisions of section ten (10), of article one (1), "of the constitution of the United States; but that as your plaintiff is "informed and believes, said city and its officers and agents now give "out and claim that said ordinance of 1887 is of no binding force or "effect, and conferred no rights upon said receiver, and therefore af- "fords no protection to the plaintiff in the premises."

And further in substance, that the plaintiff's property in said city would be assessed for the expense of said proposed so-called improvements without legal notice, and thereby it would be deprived of its property without due process of law.

The prayer of said petition, in substance, was that the defendant might

"Be perpetually enjoined from carrying said ordinances into "effect, and from in any manner destroying or taking away said over- "head bridges and the approaches thereto," and for general equitable relief. [See petition, record pp. 9–17].

To this petition answer was made by the defendant. [Record pp. 18–22.]

The case was finally heard in the Court of Common Pleas on May 24, 1893, decided against the plaintiff, and an appeal taken to the Circuit Court of said county [Record p. 23]. It was finally heard in the Circuit Court on March 2, 1894, and decided against the plaintiff. [Record pp. 25–26]. In the judgment of the said Circuit Court is the following finding:

"And thereupon, on request of the plaintiff, the court finds that "a federal question was raised in the case on the final trial thereof by "the plaintiff, both in its petition, to the effect that said ordinances of "the said city of Defiance, if carried into effect, would be in contraven- "tion of the provisions of the Constitution of the United States, and es- "pecially of Art. 1, Sec. 10 thereof, and also in argument by "plaintiff's counsel, fully set forth in their brief and contended for by "them, that said questions were necessarily involved in the decision "of this case and that the court decided the said federal question and "constitutional points against the contention of the plaintiff." [Record p. 26.]

For the purpose of reviewing the judgment of the said Circuit Court, a petition in error was filed in the Supreme Court of Ohio,

which came on for final hearing therein February 5, 1895, and the judgment of the said Circuit Court was affirmed by the said Supreme Court. In the record of the judgment of the said Supreme Court is the following:

"Whereupon upon motion of the said plaintiff in error, this court "orders it to be, and it is hereby, certified and made a part of the "record in this case and of the above entry and judgment of affirmance "that said plaintiff in error specially set up and claimed in this court "that the said ordinances of the said defendant of February 7, 1893, "if carried into effect were repugnant to the constitution of the "United States, especially of article 1, section 10, thereof, in this, that "they were laws impairing the obligation of the contract made by the "said defendant with the said plaintiff by its ordinance of December, "1887, set forth in the said plaintiff's petition in the court of Common "Pleas; and further, that said plaintiff claimed in this court that said "ordinances of the defendant of February 7, 1893, if carried into "effect, would deprive the plaintiff of its property without due process "of law in this, that without compensation therefor it would deprive "the plaintiff of the free and uninterrupted use and enjoyment of the "said highways (bridges) named in its petition, acquired under the "said ordinance of December, 1887.

"And this court hereby further orders it to be, and it is hereby, "certified that the said judgment and decision of this court were and "are against the said claims of the said plaintiff under the Constitution "of the United States." [Record pp. 6 and 7.]

It is the record of the said Circuit Court of Defiance County and of the judgment of the said Supreme Court of the State of Ohio, affirming it, that comes before this court here now for review.

At the trial in the State Circuit Court, the plaintiff offered to give in evidence by e..pert witnesses, in substance, that the reducing of said highway crossings to grade by carrying into effect the said city ordinances, would subject the operation of the plaintiff's railroad to frequent accidents, be destructive to the property of the plaintiff, increase the danger to the life and property of the public, both traveling on the company's railroad and on the highways at said crossings, and thereby impose upon the company an additional liability on account of its responsibility therefor, and that it would be impossible with the exercise of the utmost care, or by erecting gates, or employing watchmen at said crossings, or by the use of any device or means known to railroad managers, to prevent such accidents and avoid the consequent injury and damage therefrom. The court refused to permit this evidence to be given, to which the plaintiff duly excepted.

By Mr. Woodward (resident engineer of the company) plaintiff offered to prove the following:

"Q. What, in your judgment, would be the effect of the carrying into execution of the ordinances establishing grade crossings at these points, upon the danger to the public traveling over the railroad or on the roadway?

"Objection; objection sustained; exception. (Exception.)

"Mr. Smith (to the Court): We expect to show by the answer "of the witness to this question, that in his judgment it would be the "effect of the execution of these ordinances to vastly increase the "danger to life and property of the public traveling on the railroad, "and also to those traveling upon the highways in question." [Record p. 31.]

By Mr. Gould (Supt. Eastern Div. of the plaintiff's road), the following:

"We propose to show by this witness, the superintendent of "the company, that it would be impossible by gates or by watchmen, "considering the steep down-grade, and considering the sharp curves "at both of these crossings, with the utmost care, to prevent continuous "accidents, judging from his past experience in railroad management."

* * * * * * * *

"I propose to prove, if the court please, that the crossings, if the "provisions of the ordinance were carried into effect to make them "grade crossings, where they now exist, would be exceedingly dan-"gerous to the lives and limbs of passengers attempting to make "them on the public highways; and on account of the liability to "accidents there by their trains meeting with obstacles on the track, "that it would also be exceedingly dangerous to trainmen in operat-"ing them, and to passengers in their passenger cars." [Record pp. 35 and 36.]

By Mr. Kirkby (Commissioner of Railways of the State of Ohio), the following:

"Q. Please state what, in your opinion, would be the char-"acter of those crossings if reduced to grade level with the rail-"road track, as to being dangerous or otherwise to the lives of the "public crossing the track on the public highway?

"A. They would be exceedingly dangerous, because the track is "down grade there, and it would make a ten to twelve foot cut below "the surface of both streets, and the railroad track is also in a cut of "about the same depth, and the sight and sound of approaching trains "would be cut off from persons about to make the crossings.

"Q. State whether in your opinion it will be possible to make "those crossings, if reduced to grade level with the railroad track, "secure and safe to the public traveling on the highways?

"A. I don't think it could, under the circumstances and loca-"tion. * * *

"Q. What is your opinion as to whether they would [could]

"be made secure, so as to be reasonably safe to the lives and limbs of "the public making the crossings?

"A. I don't think they would, because a grade crossing is never "safe for foot passengers on account of children using them so fre- "quently. I do not think, either, that they would be safe to the pub- "lic crossing with carriages and teams." [Record, pp. 49 and 50.]

By Mr. Magee (Gen. Supt. plff's road), the following:

"A. The effect of removing said bridges and making grade, "would, in my opinion, make them very dangerous crossings for the "public, as well as for the railroad company. It would increase the "danger to the lives of those who would have to cross, as well as the "lives of the trainmen, owing to the crossings being in a deep cut ap- "proaching the railroad tracks from either side, and the railroad "track approaching the crossing from the west being on a curve." [Record, p. 52.]

By W. S. Lincoln (Chief Engineer of plff's road) the following:

"I think the effect of removing those bridges, and substituting "grade crossings in their place, would be extremely disastrous to the "traveling public, and that such a change should not be made. The "construction of grade crossings at such a point would be simply to "make a death-trap for everybody traveling on the roads, and, in my "opinion, such an act would be criminal. It would also greatly in- "crease the danger to passengers in transit on trains of the Wabash "Railroad, to freight and property being transported by the railroad, "and to the lives of the men employed on the trains." [Record, p. 55.]

By Mr. Bryan (Supt. Terminals L. & N. R. R.) the following:

"A. I would state that where it is possible to avoid a grade "crossing it is always well to do so, and when the conditions exist as "shown in this plat, located in a community where a crossing is con- "stantly used, it would be almost criminal to make a grade crossing "where it can be avoided, as in this case."

* * * * * * *

"A. I should think that the effect (of reducing the crossings to "grade) would be to increase the danger and risk of accident from a "minimum to a maximum, and that the utmost care in the operation "of a road under such conditions would be required to prevent fre- "quent accidents. And with the utmost care it would be impossible "to prevent frequent accidents occurring at a point situated as this is." [Record pp. 56 and 57.]

By Mr. Peck (Supt. bridges Mo. Pac. system), the following:

"Q. What, in your opinion, as a practical bridge builder and ex- "perienced railroad man, would be the effect of such proposed "changes?

"A. It is my opinion that it would subject the railway company "and the public to liability to serious loss and trouble, on account of "extraordinary liability to accident."

* * * * * * *

"Q. What, in your opinion, would be the effect so far as the "public is concerned, of removing the present overhead bridges at "those points, and substituting grade crossings therefor?

"A. It is my opinion that it would subject the public to great "liability to accident. I am of the opinion that the present overhead "bridges would be entirely safe, comparatively speaking." [Record pp. 58 and 59.]

By H. W. Gays (General Manager Merchants' Bridge R. R. Co., St. Louis), the following:

"A. To remove the overhead bridge and substitute therefor "grade crossings, under the conditions as indicated, on the plat, would "add materially to the dangers of the users of the crossings, both to "the users of the railway and the users of the streets."

* * * * * * * *

"A. Such a proceeding would so seriously add to the dangers "of the users of the crossings that my judgment is that it should "not be done. Certainly, as a railway manager, I would object most "seriously to such a course, for the reason that a blind crossing of "the character that this would make it, could not be fully protected "by any appliance known, as gate, device, so that the public would "have the full safeguard that the overhead bridge gives them at the "present time. Such a course would substitute for what is now prac-"tically a safe crossing, and make it extremely dangerous to the users "of the same." [Record pp. 60 and 61.]

By Mr. P. C. Sneed (Supt. Chicago Div. B. & O. R. R.), the following:

"A. If these crossings were reduced to grade with the railroad "track, the streets would be in quite a deep cut, which would neces-"sarily obstruct the view of persons using the street, and would also "prevent them hearing distinctly the approach of trains. I there-"fore think such crossings would be dangerous to persons and teams "so using them, and would increase the liability of accident. It is "impossible to say to what extent such accidents would damage the "property and passengers of the Wabash Railroad Company, but seri-"ous accidents would be likely to occur."

* * * * * * * *

"A. I think such a crossing would be dangerous, and have no "knowledge of any appliance which would make such a crossing ab-"solutely safe." [Record p. 62.]

Assignment of Errors.

The assignment of errors on the writ are on pages 2 and 3 of the printed record. I specify more particularly or abbreviate those which I shall argue.

I.

The ordinances of the city of February 7, 1893, were laws which, if carried into effect, would impair the obligation of the contract made

by the railroad company with the city under the ordinance of December 26, 1887, whether the latter be considered as a contract *inter partes* or as a license to the railroad company, *acted on by it;* and the judgment of the Supreme Court of Ohio is erroneous in sustaining the validity of these ordinances. (Assignments 1, 2 and 3 on the writ.)

II.

The right to maintain these overhead crossings by means of which the plaintiff could run its trains in safety without danger of injury to its passengers, trainmen and property, is a valuable franchise and property, of which the carrying into effect of said ordinances would deprive it, without due process of law, contrary to the provisions of the Constitution of the United States and the State of Ohio, and for this reason the judgment of the Supreme Court of Ohio, in holding these ordinances valid is erroneous. (Assignments 4 and 6 on writ.)

III.

First. The refusal of the Circuit Court of said Defiance county to hear the testimony, set forth above in the statement of the case, and its decision against the plaintiff without hearing any evidence on those questions, holding said ordinances valid, was in legal effect a decision against the plaintiff *without a hearing*, contrary to due course of law, and had the effect to deprive the plaintiff of its property without due process of law. The judgment of the Supreme Court of Ohio affirming the decision of the said Circuit Court in this respect is erroneous. (Assignments 4 and 6 in writ.)

Second. A. If it was a trial by due course of law for the Circuit Court to refuse to hear the above testimony, then it must be held that the carrying of the said ordinances into effect would seriously impair if not destroy the use of the plaintiff's railroad and thereby, by the decision of the court holding said ordinances valid, the plaintiff would be deprived of its property without compensation, and without due process of law. For this reason the Supreme Court of Ohio erred in affirming this decision.

ARGUMENT.

1.

By article 1, section 10 of the Constitution of the United States, it is provided that "No State shall * * * pass any * * * law impairing the obligation of contracts."

First. The ordinance of December 20, 1887, passed by the city under authority conferred upon it by the State *is a law of the State.*

The State of Ohio had conferred on the city of Defiance authority to pass this ordinance. (R. S. of Ohio, Sec. 1692, par. 18, and Sec. 2301.)

This authority may be conferred by a law of the State applying generally to all municipalities of the State as well as to the city of Defiance specially.

Hamilton Gas Light & Coke Co. v. *City of Hamilton*, 146 U. S. 258 (13 Sup. Ct. Rep. 92).

In the opinion of the Court in this case, page 266, Mr. Justice Harlan says:

"We sustain the jurisdiction of the Circuit Court because it appears that the defendant grounded its right to enact the ordinance in question, and to maintain and erect gas works of its own, upon that section of the municipal code of Ohio, adopted in 1869 (now section 2486 of the Revised Statutes), providing that the city council of any city, or village should have the power, whenever it was deemed expedient and for the public good, to erect gas works at the expense of the corporation, or to purchase gas works already erected therein; which section the plaintiff contends, if construed as conferring the authority claimed, impaired the obligation of its contract previously made with the State and the city." [Page 266.]

It has been repeatedly held by the courts that a city ordinance passed under authority conferred on it by the State, is a *law*, within the meaning of this provision of the United States Constitution. Such ordinances are held to be laws of the State, for the reason that the sole authority to pass them rests upon the legislative enactments;

that is to say, that the legislature of the State acts through the municipality, as its agent, in the passage of the ordinance.

Wright v. *Nagle*, 101 U. S. 791.

In this case it was held that the grant of the franchise to the plaintiff to maintain a toll-bridge by the Inferior Court of Floyd County, Ga., was an act of the State. The Chief Justice in the opinion of the Court, page 794, says:

"The legislature of the State alone has authority to make such a "grant. It may exercise this authority by direct legislation, or "through agencies duly established, having power for that purpose. "The grant when made binds the public, and is directly or indirectly "the act of the State. The easement is a legislative grant whether "made directly by the legislature itself or by any one of its properly "constituted instrumentalities."

In *New Orleans Water Works* v. *La. Sugar Co.*, 125 U. S., page 30, Mr. Justice Gray says:

"As later decisions have shown, it is not strictly and literally true that a law of a State, in order to come within the constitutional prohibition, must be either in the form of a statute enacted by the legislature, in the ordinary course of legislation, or in the form of a constitution established by the people of the State as their fundamental law.

In *Williams* v. *Bruffy*, 96 U. S. 176, 183, it was said by Mr. Justice Field, in delivering judgment, 'Any enactment, from whatever source originating, to which a State gives the force of law, is a statute of the State, within the meaning of the clause cited relating to the jurisdiction of this court.' * * *

So a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of this article of the Constitution of the United States." [Page 31.]

See also *N. O. Gas Co.* v. *Louisiana Light Co.*, 115 U. S. 650, and *N. O. Water Works Co.* v. *Rivers*, Id. 674.

It is held by the Supreme Court of Indiana in *Western Paving & Supply Co.* v. *Citizen St. Ry. Co.*, 128 Ind. 525, that a charter, granted by a city council to a street railway company, under authority of the State, was a law of the State, and that its provisions constituted a contract with the city. To the same effect is *City of Indianapolis* v. *Consumers Gas Co.*, 140 Ind. 107 (49 Am. St. 183).

The decisions of the Circuit Courts of the United States holding

ordinances of cities passed under authority of the State, *laws of the State*, are quite numerous.

In *Cleveland Gaslight Co.* v. *City of Cleveland*, 71 Fed. Rep. 610, Judge Jackson (afterward a justice of this court), held an ordinance of the city of Cleveland passed under a law of the State conferring such powers *generally* on such cities, fixing the price of gas, to be a law of the State. An ordinance of the city of Baltimore passed under the general powers conferred on the city by the State was held to be a law of the State in,

Baltimore Trust & Guarantee Co. v. *Mayor, etc.*, 64 Fed. Rep. 153.

To the same effect is *Capital City Gaslight Co.* v. *City of Des-Moines*, 72 Fed. Rep. 829.

Citizens St. Ry. Co. v. *City Ry. Co.*, 56 Fed. Rep. 746.

Westerly Water Works Co. v. *Town of Westerly*, 75 Fed. Rep. 181.

Second. Did the plaintiff have a contract with the city under this law? The ordinance of 1887 contained all of the elements of a contract, it was made and accepted between parties competent to contract, for valuable consideration and was not illegal. Under the ordinance of 1876, by which the plaintiff had granted permission to the city, then the village, of Defiance, to construct a sidewalk to the overhead bridge crossing of Holgate Pike (North Clinton street), the city was forever required to maintain in safe condition and keep the same in repair at its own cost and expense, that it should be renewed and repaired from time to time as directed by the company's engineer, and that the city should be absolutely responsible for its safe repair and maintenance [Record page 45]. Language can not be found in stronger terms, imposing the burden of maintaining this walk on the city. At this time to, and until 1887, the railroad company was not required to maintain approaches to these overhead highway crossings of greater width than the traveled part of the road.

In 1887 these overhead bridges were sixteen feet and ten inches "in the clear" from the railroad track; it is in evidence that with the

continually increasing height of cars which the railroad company was required to haul in its trains, these bridges should be of a height of at least twenty-one feet above the track in order to prevent accidents and consequent loss of life and limb to its trainmen. And in December, 1887, the railroad company applied to the city for leave to raise these bridges to that distance. This authority was granted by the ordinance of December 20, 1887. By it the city was relieved from the burden of maintaining the sidewalk and sidewalk approaches to the bridge on North Clinton street under the ordinance of 1876, and the railroad company agreed thereafter to construct and maintain, at its expense, sidewalks to both of said bridges eight feet wide and the approaches thereto, as well as to raise and thereafter maintain the approaches of the highways to the increased height of the crossings. This was done by the company at an expense of about $2,500. [Record pp. 37 and 38.]

There was then ample consideration for this contract, both in the release of a burden to the city and the assumption of one by the railroad company. Also the ordinance of 1887 changed the grades of the streets and fixed the grade, at the crossings, at a height of twenty-one feet above the railroad track, the expense of increasing this grade, had it not been assumed by the railroad company, must have been borne by the city. [R. S. of Ohio, Sec. 2301.] It seems conclusive that, by this ordinance, there was a contract between the parties.

Third. Whether we treat this ordinance of December 20, 1887, as a license to the railroad company, *acted on by it*, or as a contract *inter partes*, it was a contract within the provisions of section 10 of article 1 of the constitution, and could not be abrogated by carrying into effect the ordinances of February, 1893, reducing the overhead highway crossings to grade crossings on a level with the railway track.

1. It has been the settled law of Ohio since the year 1846 that a parol license *acted on is irrevocable.*

Wilson v. *Chalfant*, 15 Ohio, 248.

Chief Justice Wood says in his opinion, page 252:

"But in Ohio, we think it can at this day be hardly considered

as an open question. * * * *A parol license executed* has been held to be *irrevocable* in numerous instances, upon the circuit *at law.*"

This case was cited and followed by Judge Brinkerhoff in his opinion, 1st par. pp. 5 and 6, in

Railroad Co. v. *Ruggles*, 7 O. St. 1.

In *Meek* v. *Breckenridge*, 29 O. St. 642, the court uses the following language [Opinion page 650]:

"The agreement acted upon and executed by the parties, constituted a license irrevocable, so long as the house remained standing upon the premises. When a license of this character is granted, and the licensee by reason of it erects a building on his own land, to the enjoyment of which the right or easement created by the license is indispensable or necessary, the license can not be revoked. (Citing *Wilson* v. *Chelfant*, *supra.*)

It was held in the case of *McKillop* v. *McIlhenny*, 4 Watts 317 (28 Am. Dec. 711), that a license to erect and maintain a dam to flow back water, if executed, can not be revoked by the licensor or his grantee.

In *Rhodes* v. *Otis*, 33 Ala. 578 (73 Am. Dec. 439), the Court say:

"It is against all conscience to permit a party to revoke his license after the other party has acted upon it so far that damages would result from the revocation and estoppel *in pais* applies to such an injurious revocation."

In *Huff* v. *McCauley*, 53 Pa. St. 206 (91 Am. Dec. 203), the Court held that a parol license to do something on the licensor's land, when followed by the expenditure of money on the faith of it, is irrevocable, and is to be treated as a binding contract.

See *Grimshaw* v. *Belcher*, 88 Cal. 217 (22 Am. St. 298).
Flickinger v. *Shaw*, 87 Cal. 126 (22 Am. St. 234).

Rorer, in his work on Railroads, Vol. 1, page 655, states the law as follows:

"Where, under the semblance of a valid grant, there has been several years user of a right of way by a railroad company in the streets of a city, and a bonus agreed on as the consideration thereof has been regularly paid to and received by the city, and acts have been done or ordinances passed by the latter, recognizing the existence of the right, in such case the municipal corporation is estopped to deny the validity thereof. This, too, although such grant be originally of doubtful legality, as made or perfected in violation of a military order, during military rule in the city. Such subsequent action

of the city authorities, in recognition of the grant or right, amounts to a ratification thereof."

In *People* v. *O'Brien*, 111 N. Y. 1 [7 Am. St. 684], the Court held that an interest in the streets of the city of New York may be granted in perpetuity, and irrevocably, by the city authorities, and that a franchise to construct and maintain a street railway is not a mere license or privilege enjoyable only during the life of the grantee, and revokable at the will of the State.

In *Fletcher* v. *Peck*, 6 Cranch 87, it was held that when law is, in its nature, a contract, when absolute rights have vested under that contract, a repeal of the law can not divest those rights; a party to a contract can not pronounce its own deed invalid, although that party be a sovereign State; a grant is a contract executed; a law annulling conveyances, is unconstitutional, because it is a law impairing the obligation of contracts within the meaning of the Constitution of the United States.

See *City of Galveston* v. *Galveston City R. R. Co.*, 46 Tex. 435 (13 Am Ry. Rep. 374, *380*).

Davenport C. R. R. Co. v. *Gas Light Co.*, 43 Iowa 301 (14 Am. Ry. Rep. 437).

Commonwealth v. *Essex Co.*, 13 Gray, 239.

In re Phila. W. & B. R. R. Co., 121 Pa. St. 44 (15 Atlantic Rep. 476).

A case almost identical with the one at bar, the Supreme Court of Pennsylvania held that *when a public highway crossed the railroad track by means of an overhead bridge which had been constructed by the railroad company under an agreement with the city, the street could not afterward be reduced to grade.*

Where a grant of a franchise has been made by a municipality as agent of a State, a contract is implied not to reassert the right to what has been granted.

Port of Mobile, etc., v. *L. & N. R. R. Co.*, 84 Ala. 115 (5 Am. St. 342).

Stein v. *Mayer, etc., of Mobile*, 49 Ala. 362 (20 Am. Rep. 283).

City of Burlington v. *Burlington Street Ry. Co.*, 49 Iowa 144 (31 Am. Rep. 145).

2. Such grants have uniformly been held by the courts to be contracts between the parties which could not be abrogated by either of them. This has been the settled law of this Court and the courts of all the States since the celebrated case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518.

Prior to this, it had been held to be the law of this Court in *Fletcher* v. *Peck*, *supra*, and in *New Jersey* v. *Wilson*, 7 Cranch 164.

In *Providence Bank* v. *Billings*, 4 Pet. 514, Chief Justice Marshall says [page 560]:

"It has been settled that a contract entered into between a State and an individual is as fully protected by the tenth section of the first article of the constitution as a contract between two individuals."

Woodruff v. *Trapnall*, 10 How. 190.
Bridge Proprietors v. *Hoboken Co.*, 1 Wall. 116.
The Binghamton Bridge, 3 Wall. 51.
Von Hoffman v. *City of Quincy*, 4 Wall. 535.
Murray v. *Charleston*, 96 U. S. 432.
Wolf v. *New Orleans*, 103 U. S. 358.

In this case Justice Field says [page 367]:

"The prohibition of the constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority as well as to contracts between individuals."

The cases of *New Orleans Gas Co.* v. *Louisiana Light Co.*, and of *New Orleans Water Works Co.* v. *Rivers*, 115 U. S. 650 and 674, followed in *Tammany Water Works Co.* v. *N. O. Water Works Co.*, 120 U. S. 64, are conclusive of this case. See also

Louisville Gas Co. v. *Citizens Gas Co.*, 115 U. S. 684.
Edwards v. *Kearsey*, 96 U. S. 595, last par. of opinion, 607.
McGohey v. *Virginia*, 135 U. S. 662.
Pennoyer v. *McKonnaughy*, 140 U. S. 1.
Barnitz v. *Beverly*, 163 U. S. 118 [16 Sup. Ct. Rep. 1042].

It seems superfluous to refer the Court to the numerous decisions of the States holding to the same effect; in addition to those in subdivision 1st, *supra*, I cite only the following:

C. & S. Ry. Co. v. *Village of Carthage*, 36 O. St. 631.

Savage v. *City of Salem*, 23 Or., 381 [37 Am. St. 688], and *Indianapolis* v. *Consumers' Gas Trust Co.*, 140 Ind. 107 [49 Am. St. 183].

It is positively established by the foregoing authority that the right to use the streets named as a *safe passage* for the public over its railway track granted to the plaintiff by the defendant under the ordinance of 1887, could not be abrogated and destroyed by the ordinances of 1893.

In this conclusion I have not lost sight of the principle that it is incompetent for this legislative body to bargain away the police power of the State. On this principle the defendant mainly bases its defense; but the exercise of this power in this case must be confined to the protection of "the public health, morals and safety" and not exercised for the purpose of destroying the lives and imperiling the safety of the public on the highways and the trainmen and passengers of the plaintiff, as is conclusively proved would be the result if these crossings were reduced to grade. The claim of the defendant that by virtue of its police power it has a right to reduce these crossings to grade is fully answered in *Indianapolis* v. *Consumers' Gas Co.*, *supra*, and *New Orleans Gas Co.* v. *Louisiana Light Co.*, *supra*, page 662 *et sequens*, and see Dillon's Municipal Corporations, Sec. 691.

II.

The use that the railroad company had acquired in the said highways over its track by means of the said overhead bridges as a *safe passage* for the public and thereby the prevention of accidents to its trainmen and passengers and the destruction of its property, *had become a valuable franchise and property vested in the plaintiff*, of which by the enforcement of the said ordinances of 1893 the plaintiff would be deprived without compensation and without due process of law, contrary to the provisions of the 14th amendment of the Constitution of the United States and of section 16 of article I of the Constitution of Ohio.

It is averred in the plaintiffs' petition [page 14 of record]:

"That if said crossings are reduced to grade, as proposed by said ordinances, the approaches to said track will be down a steep inclined plane on both sides of said track, on both said highways; so that at said crossings the said highways will be cut to a depth of about eleven and one-half feet below the adjacent lands. That it will be almost, if not quite impossible for heavily loaded teams to stop for trains when approaching said track; and that by reason of the deep cuts both of said railway and highways in which said crossings will be located and of the curve and grade of said railway at said points, the sound of any signal and the sound and sight of approaching trains will be cut off and said crossings will be excessively difficult, and dangerous to the lives of persons crossing plaintiff's track along said highways, and to the lives, limbs and property of its passengers and patrons being carried on the trains of the plaintiff, on account of unavoidable accidents and collisions there happening, and that thereby there will be cast upon the plaintiff an additional burden and liability to its said passengers and the public. That the natural conformity of the land at said crossing is such as to make overhead bridge crossings of said public highways over plaintiff's said track absolutely essential to the public safety."

And (page 15) as follows:

"That further the grading down of said highways as proposed by said ordinances for that purpose will be an appropriation of the plaintiff's property, and will also cast an additional burden upon the plaintiff in the establishing and maintaining of new grade crossings over its said track."

1st. Those bridge crossings over the highways had existed since the construction of the railroad in 1855, having been built at the time by the company by agreement, express or implied, with the then village of Defiance, under section 3283 of the Revised Statutes of Ohio providing as follows:

"If it be necessary in the location of any part of a railroad, to occupy any public road, street, alley, way or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities owning or having charge thereof, and the company, may agree upon the manner, terms and conditions upon which the same may be used or occupied."

It is further provided in section 3284 as follows:

"A company may, whenever it is necessary in the construction of its road to cross a road or a stream of water, divert the same from its location or bed; but the company shall, without unnecessary delay, place such road or stream in such condition as not to impair its former usefulness."

Thereby the company had acquired the right to use and occupy said streets for its track and the safe running of its trains thereon, and continuously from that time said bridge crossings have been maintained with the consent and acquiescence of the city down to 1893, *so that a grant of the use of said streets for the company's track will be presumed.*

It is held in *C. & S. Ry. Co.* v. *Village of Carthage*, 36 O. St. 631:

"That an ordinance passed to rescind the grant is inoperative "without the consent of the railroad company, as the original grant "and its acceptance by the company constituted a valid contract be- "tween the parties." [P. 634.]

Gregston v. *City of Chicago*, 145 Ill. 451.

In *People* v. *O'Brien*, *supra*, the Court of Appeals of New York held that a franchise to operate a street railway and the use in the streets acquired under it were uniformly regarded as indestructible by legislative authority, and as *constituting property in the highest sense of the term.* (See opinion of the court by Chief Justice Ruger, page 44, *et sequens.*) It was held in *City of Detroit* v. *Plank Road Co.*, 43 Mich. 140, that toll gates, lawfully placed within the city limits under the provisions of the company's charter, were property, and that the legislature had no power to compel the defendant to remove them. Judge Cooley, in the opinion of the court, says:

"It can not be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since Magna Charta, and in this country, always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making a profitable use of a franchise granted by the State, it is enough that it has become private property, and it is protected by the law of the land."

If by the enforcement of these ordinances of 1893, there will be an additional burden cast on the plaintiff in protecting itself, so far as possible, from accidents at the proposed grade crossings, it will be a taking of the plaintiff's property; on the other hand the easement in the bridge crossings now existing, is *property* within the meaning of the constitutional provision, the destruction of which will

be a taking of its property. In *Reeves* v. *Treasurer*, 8 O. St. 346, 347, in the opinion of the court, it is said :

" An easement is property; and to the extent of such easement, it is clear to us that private property is taken within the meaning and spirit of the constitutional prohibition."

In *Commonwealth* v. *Essex Co.*, 13th Gray 239, a case as stated in the syllabus, where the defendant

" had made and maintained a fish-way in its dam across the Merrimac river to the satisfaction of the county commissioners, as required by its charter and afterward had increased its capital stock on condition that it should be liable for all damages occasioned by its dam to the owners of fish rights above it. It was held that having paid large sums of money for such damages, it could not be required afterward, by the legislature, to make different fish-ways, although the statutes of the State reserved the right to the legislature to amend, alter or repeal charters,"

and that the maintenance of the company's dam as erected had become a vested right and property. In the opinion of the court, pp. 253-254, Chief Justice Shaw says :

" It appears to us, in the present case, that after * * * the defendant company had executed their part of the contract by the payment of a large sum of money, it was not competent for the legislature, without any change of circumstances, under their authority to amend and alter the charter of the company, to pass a law requiring them to do acts from which, by the terms of the contract they had been exempted, and therefore that the said act was null and void."

It was held in *Conway* v. *Taylor's Executor*, 1 Black 603, that a ferry franchise is property, in the opinion of the Court page 632, Mr. Justice Swayne says :

" A ferry franchise is as much property as a rent or any other incorporeal hereditaments or chattels or realty. It is clothed with the same sanctity and entitled to the same protection as other property."

The Supreme Court of New Hampshire in regard to this question of property and what constitutes a " taking " of it within this constitutional prohibition says :

" The constitutional prohibition (which exists in most or all of the States) has received in some quarters a construction which renders it of comparatively little worth, being interpreted much as if it read, 'No person shall be divested of the formal title to property without compensation, but he may without compensation be deprived of all that makes the title valuable.' To constitute a 'taking of the property,' it seems to have sometimes been held necessary that there should be 'an exclusive appropriation, a total assumption of possession,' 'a

complete ouster,' an absolute or total conversion of the entire property, 'a taking the property altogether,' these views seem to be founded on a misconception of the term 'property,' as used in the various State constitutions."

And, also,

"If on the other hand, the land itself be regarded as 'property' the practical result is the same. The purpose of this constitutional prohibition can not be ignored in its interpretation. The framers of the constitution intended to protect rights which are worth protecting; not mere empty titles or barren insignia of ownership, which are of no substantial value. If the land, 'in its corporeal substance and entity' is 'property,' still all that makes this property of any value, is the aggregation of rights or qualities, which the law assumes as incidents to the ownership of it. The constitutional prohibition must have been intended to protect all the essential elements of ownership which make 'property' valuable. Among these elements is fundamentally the right of user, including, of course, the corresponding right of excluding others from the use * * * a physical interference with the land, which substantially abridges this right, takes the owner's 'property' to just so great an extent as he is thereby deprived of this right. To deprive one of the use of his land is depriving him of his land; for, as Lord Coke said: 'What is the land, but the profits thereof?' * * * The private injury is thereby as completely effected as if the land itself was physically taken away."

Eaton v. *Boston, Concord & Montreal R. R. Co.*, 51 N. H. 504.

Pumpelly v. *Green Bay Co.*, 13 Wall. 166, is a case for damages against the defendant for overflowing the plaintiff's land by means of a dam erected across the Fox river (Wisconsin). The defendant pleaded in defense that the State of Wisconsin had authorized the erection of the dam, for the purpose of improving the navigation of the Fox river (but no compensation was provided for the plaintiff for the injury done him), and the defendant claimed the right to build and maintain the dam without legal responsibility for this injury. It was held that the overflowing was a "taking" of the plaintiff's land within the constitutional prohibition. In the opinion of the Court Mr. Justice Miller says:

"It would be a very curious and unsatisfactory result, if in construing a provision of constitutional law, always understood to have been adopted for protection and security to the rights of the individual as against the government, and which has received the commendation of jurists, statesmen and commentators as placing the just principles of the common law on that subject beyond the powers of ordinary legislation to change or control them, it shall be held that if the government refrains from the absolute conversion of real prop-

erty to the uses of the public it can destroy its value entirely; can inflict irreparable and permanent injury to any extent; can, in effect, subject it to total destruction without making any compensation, because, in the narrowest sense of that word, it is not taken for the public use." [Page 177.]

And again:

"* * * it remains true that where real estate is actually invaded by superinduced additions of water, earth, sand or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking within the meaning of the constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle." [Page 181.]

And see *Kaukauna Water Co.* v *Green Bay, etc., Canal Co.*, 142 U. S. 254.

This use of the highway crossings over the plaintiff's track, acquired as above stated, was absolutely essential to the safe operation of its railroad, by reason of the increased and continuously increasing weight and speed of trains, which railroad companies are required to run to meet the public demands and the necessities of their traffic, and to discharge their obligations to the government in carrying its fast mails, they must have a clear track, free from obstacles and the unlawful control of local authorities along their lines. The law which imposes the obligations, should also protect their rights in this respect.

It is provided in the Constitution of Ohio (Art. 1, Sec. 19), that "Private property shall ever be held inviolate, but subject to the public welfare; * * * and * * * where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner."

This provision has uniformly been construed by the courts of Ohio in favor of the property owner.

McCoy v. *Gandy*, 3 O. St. 463.
Lamb v. *Lane*, 4 Id. 167, followed in
Teagarden v. *Davis*, 36 Id. 601.
Shaver v. *Starrett*, 4 Id. 494.
Reeves v. *Treasurer of Wood County*, 8 Id. 333.
Gilpin v. *Williams*, 25 Id. 283, and especially
Ohio ex rel. v. *Neff*, 52 O. St. 375.

24. Nor is it competent under a general legislative grant of power, to appropriate for one public use what is already applied to another public use, when the latter use would be destroyed by the former. This was held in *B. and O. & C. R. R. Co.* v. *North*, 103 Ind. 486 (1 West. Rep. 469). In the opinion of the court, Judge Howk, says, "The law seems to be well settled, that, lands once taken for a public use can not, under general laws, without an express act of the legislature, for that purpose, be appropriated by proceedings, *in invitum*, to a different public use."

See also *Hickok* v. *Hine*, 23 O. St. 523.
Pierce on Railroads, page 156.
Mills Eminent Domain, Secs. 45 and 46.

During the first receivership of the Wabash railroad, it was held by the Circuit Court of the United States for the Northern District of Ohio, on the intervening petition of the Treasurer of Defiance county, that a tax levied for a county ditch along and on the railroad right of way was illegal and could not be collected, and that the right of way having been subjected to the use of the railroad company, could not be appropriated for another public use, and that the flooding of the railroad right of way occupied by the ditch that had been constructed on it by water from the adjoining lands, was subjecting the right of way to a new use, by which the company's property was taken without due process of law.

What then is "due process of law?" This question is best answered in the opinions of this Court by Mr. Justice Miller, in

Davidson v. *New Orleans*, 96 U. S. 97,

and by Mr. Justice Matthews in

Hurtado v. *People of California*, 110 U. S. 516;

see, also,

Stuart v. *Phelps*, 74 N. Y. 183,

and

Cooley's Const. Limitations, 432, *et sequens.*

III.

The refusal of the Circuit Court to hear testimony as to the exceedingly dangerous character of the crossings if reduced to grade, and that by no means or appliance known, could they be made safe, was contrary to due course of law. It was in fact a decision of the case without a hearing and without giving the plaintiff an opportunity of being heard.

First

1st. The evidence offered went to prove facts at issue in the pleadings in the case, not opinions nor theories, of which facts the court was ignorant and of which it could not take notice judicially. By this refusal the court rendered judgment against the plaintiff without a trial or opportunity to the plaintiff to be heard; it was a denial of justice and without authority of law. (See the testimony rejected, in statement of the case *supra*, pages 8–10.) The practice in Ohio is under a code and there is no distinction between law and equity practice in this respect. Exceptions to the ruling of the court were duly taken in each instance and a statement of the evidence sought to be introduced made, (see record pp. 31, 35, 36, 42, 49, 50, 51, 52, 53, 55, 56, 57, 58, 59, 60, 61, 62 and 63,) so that the question is duly saved.

In *Ex parte Spies and others* (the so-called Anarchists' case) 123 U. S. 131, this court intimates that it would have entertained jurisdiction to review the case, had the questions been properly saved. The Chief Justice, in the opinion of the Court, says :

"Before considering whether the Constitution of the United States has the effect which is claimed, it is proper to inquire whether the federal questions relied on in fact do arise on the face of this record." [123 U. S. p. 167.]

The Supreme Court of the State found that certain papers had been given in evidence which the defendants claimed were privileged under the provisions of the constitution and held that the objection was made for the first time in that court and not in the trial court and hence not subject to review. This Court says :

"As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court,

because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more." * * * "The question whether the letter, if obtained in the manner alleged, would have been competent evidence, is not before us, and therefore no foundation is laid under this objection for the exercise of our jurisdiction." [Page 181.]

In a later case, in the opinion of the Court, the Chief Justice says:

"We repeat, as has been so often said before, that the fourteenth "amendment undoubtedly forbids any arbitrary deprivation of life, "liberty or property. * * * The Supreme Court of Michigan "did not exceed its jurisdiction or deliver a judgment abridging appel- "lant's privileges or immunities, or depriving him of the law of the "land of his domicile."

In re Converse, 137 U. S. *631, 632.*

Webster said, in his argument in the Dartmouth College case:

"By the law of the land, is most clearly intended the general law "—*a law which hears before it condemns, which proceeds upon in-* "*quiry and renders judgment only after trial.* The meaning is, that "every citizen shall hold his life, liberty, property and immunities "under the protection of the general rules which govern society."

Webster's Works, vol. 5, p. 487.

In *Ex parte Virginia*, 100 U. S. 339, Mr. Justice Strong, in the opinion of the Court, in referring to the prohibitions of the Fourteenth Amendment, says:

"They have reference to the actions of the political body denom- "inated a State, by whatever instruments or in whatever modes that "action may be taken. A State acts by its legislative, its executive, "*or its judicial* authorities. It can act in no other way. The consti- "tutional provision, therefore, must mean that no agency of the State, "or of the officers or agents by whom its powers are exerted, shall "deny to any person within its jurisdiction the equal protection of the "laws. Whoever, by virtue of a public position under a State govern- "ment, deprives another of property, life, or liberty without due pro- "cess of law, or denies or takes away the equal protection of the laws, "violates the constitutional inhibition; and as he acts in the name and "for the State, and is clothed with the State's power, his act is that of "the State; this must be so, or the constitutional prohibition has no "meaning. Then the State has clothed one of its agents with power "to annul or to evade it." [Pages 346, 347.]

In *Taylor* v. *Porter*, (4 Hill 140) 40 Am. Dec. 274, the Court say, p. 279:

"The words 'due process of law' in this place, can not mean less "than a prosecution or suit instituted and conducted according to the "prescribed forms and solemnities for ascertaining guilt, or determin- "ing the title to property."

In *Westervelt* v. *Gregg*, 12 N. Y. 202, the Court of Appeals said:

"Due process of law, undoubtedly means, in the due course of "legal proceedings, according to those rules and forms which have "been established for the protection of private rights." [Page 209.]

From the above definitions it is clear that this constitutional provision forbids the courts to deny a litigant a hearing according to due course of law, *i. e.*, their judgments must be rendered upon evidence heard in the case and not arbitrarily, according to their caprices or prejudices.

2d. Conceding that all of the testimony rejected was expert testimony, it was competent and necessarily the only evidence by which the issue could be proved. The extent of the danger of those crossings, if reduced to grade, was best known to those expert railroad managers, and whether there was any means by which accidents could be prevented at the crossings, consistent with the proper operation of the railroad, could only be known to them. It was a matter of which the court could not take judicial notice and which could not be proved by ordinary witnesses. The trial was not in accordance with the law of the land, and the judgment of the court deprived the plaintiff of its property "without due process of law." The decisions of Ohio have settled this.

Steamboat Clipper v. *Logan*, 18 Ohio 375, *394-396*.
Stewart v. *The State*, 19 Ohio 302, *307*.
Protection Ins. Co. v. *Harmer*, 2 O. St. 452, *455-458*.
See also Greenleaf on Evidence, Sec. 440, especially pp. 606, 607, 10th Ed.
Ogden v. *Parsons*, 23 How. 167.
Chicago v. *Greer*, 9 Wall. 726.
Transportation Line v. *Hope*, 95 U. S. 297.
McGahey v. *State of Virginia*, 135 U. S. 662.

The Supreme Court of Ohio, in affirming the judgment of the Circuit Court, dispose of this last question with a breath. In the opinion of the court [Record p. 91], Judge Williams says:

"The trial was to the court, and the extent to which such testi-"mony should be received and considered was largely in its discre-"tion."

And the last proposition of the syllabus of the decision [Record p. 6], is:

"When a case is tried to the court, the extent to which expert "testimony shall be received rests largely in its discretion."

This is not the law; as I have said there is now no distinction in the practice of law and equity in Ohio, but in this respect there is no distinction between the practice in equity and law. "Equity follows the law" in the competency and probative force of its evidence. And see Daniell's Chancery Practice (Perkins' Ed.), Vol. 2, page 847 and note, and pages 850–853.

Second

~~2d.~~ This branch of Div. III has been sufficiently argued, for this brief, under Div. II.

In deciding whether the judgment of the Supreme Court of Ohio, is within the prohibitions of the constitutional provisions of the United States, as claimed by the plaintiff in error, this Court will decide independently of the State court, and if a decision of the question requires a construction of the State constitution and laws and decisions, this Court will not be governed by the decisions of the State Court.

Louisville & N. R. R. v. *Palmes*, 109 U. S. 244.
Jefferson Bank v. *Skelly*, 1 Black 436.

It is proper to add, though perhaps not within the cognizance of this Court, as to the statement of Judge Williams, in the opinion of the Supreme Court of Ohio [Record page 92], that the charge of fraud in the petition "seems to have been abandoned at the trial, as no evidence was offered to sustain it, and the trial court found against it." That the facts constituting fraud were fully alleged in the petition, and "*evidence was offered to sustain it*," *but rejected by the trial court*, to which ruling the plaintiff duly excepted. [Record page 64.]

On the whole case, the judgment of the Supreme Court of Ohio ought to be reversed.

HENRY NEWBEGIN,
for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
MAR 25 1897
JAMES H. MCKENNEY
CLERK.

—IN THE—

Supreme Court of The United States.

OCTOBER TERM, 1896.

Number 239.

THE WABASH RAILROAD COMPANY,

Plaintiff in Error.

vs

THE CITY OF DEFIANCE,

Defendant in Error.

Supplemental Brief for Plaintiff in Error.

HENRY NEWBEGIN.
Attorney.

ALEXANDER L. SMITH,
Of Counsel.

TOLEDO LEGAL NEWS PRINT.

Supreme Court of The United States.

OCTOBER TERM, 1896.

Number 239.

The Wabash Railroad Company,
Plaintiff in Error,

vs.

The City of Defiance.
Defendant in Error.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR.

The principal question in this case arises under the ordinances of the City of Defiance of 1887 and 1893. These are printed in Mr Newbegin's brief (pp. 3 and 4) and it is unnecessary to set them forth again.

We claim that the ordinance of 1887 was a contract; that the ordinance of 1893 was a law impairing the obligation of that contract and therefore void under section 10 of Article I of the Federal Constitution.

This claim was presented to the Court below and was decided adversely by that Court(Rec. pp. 6 and 7)

It therefore becomes necessary for this Court to examine the question whether this claim was well founded. If the ordinance of 1887 was a contract, and a valid contract, it will scarcely be questioned that the ordinance of 1893 was a law impairing the obligation of that contract. The second ordinance in effect destroyed the subject of the first. The important question is whether or not the ordinance of 1887 was a contract. And in order to determine whether plaintiff in error is entitled to the protection of the provision of the Federal Constitution invoked by it, this Court must determine this question.

On this question the decision of the Court below is not binding on this Court.

In Mobile & Ohio R. R. vs Tennessee

153 U. S. 492—493

this Court speaking through Mr. Justice Jackson, say.

"It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provision of the state law which is claimed by the unsucessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such contract exists as claimed, and whether the state law complained of impairs its obligation."

The case then turns upon the question whether the ordinance of 1887 was a contract. It is *in form* a contract imposing burdens upon the railroad. And it was intended to

supersede all former contracts or agreements between the parties. The language of the ordinance is:

"Sec. 2. The entering upon the work of constructing said bridges by said company shall be taken as an acceptance of the terms thereof by said company, and shall be regarded as superseding any contract or agreement heretofore existing between said company and said City as to either of said bridges."

It was accepted by the railroad and acted upon. The bridges were constructed by the railroad at an expense to it of about twenty five hundred dollars ($2,500.)(Rec. pp.37-38) There can be no doubt that the parties intended to make and thought they were making a contract. We are thus brought to the vital question whether the City had the power to make and bind itself by such a contract. We claimed in the Court below and claim here that such power was expressly conferred by section 3283 of the Revised Statutes of Ohio.

This reads as follows:

"If it be necessary in the location of any part of a railroad to occupy any public road, street,alley,way or ground of any kind or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company may agree upon the manner, terms and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and if it be necessary in the judgment of the directors of such company,to use or occupy such road,street, alley, way or ground, such company may appropriate so much of the same as may be necessary for the purposes of the road, in the manner and upon the same terms as is provided by the appropriation of the property of individuals; but every company which lays a track upon any such street, alley, road or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track."

The ground of the decision of the Supreme Court of the State of Ohio, may be gathered from the fifth, sixth and seventh subdivisions of the syllabus which contains (under the rule in Ohio,) a statement of the exact points decided in the case.

These subdivisions read as follows: (Rec. pp. 5-6.)

"The powers conferred on municipal corporations with respect to the opening, improving and repairing of their streets and public ways, are held in trust for public purposes, and are continuing in their nature, to be exercised from time to time as the public interest may require, and they cannot be granted away, or relinquished, or their exercise suspended, or abridged, except when, and to the extent legislative authority is expressly given, to do so; such authority is not given by section 3283 of the Revised Statutes.

"Every grant in derogation of the right of the public in the free and unobstructed use of the streets, or restrictive of the control of the proper agencies of the municipal body over them, or of the legitimate exercise of their powers in the public interest, will be construed strictly against the grantee, and liberally in favor of the public, and never extended beyond its express terms, when not indispensable to give effect to the grant.

"An ordinance which in terms authorizes a railroad company to erect new bridges of a specified description, over the track of its railway where it crosses designated streets, the bridges to be kept in repair by the company, does not divest the municipal authorities of their control over the streets, nor impair their power to improve the same, nor entitle the railroad company to perpetually maintain the bridges as constructed; but the ordinance, and privilege granted by it, are subject to a proper exercise by the municipal body, of its power to improve the streets and make such changes in the grades as may be necessary to subserve the public interest."

We confidently submit that the Court below was in error. The section of the Ohio statute referred to was in fact the only one which in terms conferred the power upon

municipal corporations to grant steam railway companies the right to construct their railroads along or across a public highway. Unless conferred by this section such power was not expressly conferred at all.

The City undoubtedly had general control of the streets and highways under Section 2640 Revised Statutes of Ohio, which provides:

"The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

The powers conferred by this section are those referred to by the Court below in the clauses above quoted. The power of the City Council to grade and re-grade the streets is not an express, but an implied power. It can not of course be bargained away by the Council in the absence of legislative authority. But it may be bargained away if legislative authority has been given so to do.

Now if section 3283 is to have any meaning whatever, it must be construed as conferring power on the City to do something that it would not have authority to do under the general statute (Sec. 2640.) When the statute says the municipal corporation and the Company "may agree" it means of course may "make an agreement," (i. e. a contract) as to the "manner, terms and conditions" upon which the street or any part thereof shall be occupied. The manner would include the location of the track in the highway; the character of the crossing whether at a grade or otherwise; height of bridges, if bridges are to be constructed, etc. The terms and conditions would include the payment for the privilege of laying track in the street, the payment of

expense of constructing the crossings or bridges, their maintenance, repair, etc. All these are matters of contract. It does not seem possible that the legislature intended by this to confer power upon a city, to make a contract with a railroad company which should be binding upon the railroad company but not on the city. If this be the case no contracts between railroads and municipal corporations in Ohio relative to the use of streets by the railroads (all of which have been made under this section) are of the slighest value. They are indeed not contracts at all. That the City could under this section receive payment for a franchise; and impose heavy burdens upon the railroad; and then by simple legislative act abrogate its agreement, shocks one's sense of justice.

Our view of this statute is borne out by the provision that if the parties are unable to agree, the railroad company may condemn in the ordinary way the rights sought to be acquired by agreement. To condemn is to acquire and pay for *in invitum*. Is the right so acquired and paid for to be abolished by a simple legislative act on the part of the very party against whom it was acquired by condemnation? The question answers itself. It is a *reductio ad absurdom*. Yet such is the logical result of the decision of the court below. It is said rather by by way of argument than as essential to the decision that this statute had reference to the original location of the road. But there is no force in the suggestion. If the power to contract existed originally, the power to change by contract the "manner, terms and conditions" of the occupancy of the street by the railroad, would follow as a matter of course; the power to condemn being of course limited to actual necessities of the railroad.

That an agreement made under this section is a contract binding upon the City as well as upon the railroad was expressly held by the Supreme Court of Ohio in

Railway Co. vs. Carthage 36 O. S. 621

The first point decided by the Court as expressed in the syllabus is as follows:

"Where a village council and a railway company agree, under the statute, as to the terms upon which the company may use the streets of the village for its road, whereby the Company bound itself to grade and gravel, the streets so used, in a manner, "to the acceptance of the council," *Held*, that a subsequent ordinance repealing the contract ordinance; passed with the intent to resind the entire contract, being in-operative, without the assent of the company, to rescind the grant of the right of way, is also in-operative to release the company from its obligation to grade and gravel streets."

In this case the railway company was held to its obligation under the original contract, because the subsequent ordinance rescinding the original contract was passed *without the assent* of the railroad company, and was therefore void.

All that the Court in the present case has to say about this its previous decision is the following:

"In the first of those cases the contract was made at the time of the location of the railroad, and was an agreement in regard to the terms on which the railroad might occupy the streets of the village, and was therefore, strictly within section 3283, of the Revised Statutes; and it is especially to be noticed, that under such an agreement, the power of the municipal authorities to improve the streets, notwithstanding the location of the railroad in them, while not involved in the action, is recognized by the Court in the opinion."

But as we have seen, the power to agree upon "manner terms, and conditions" of occupancy of the streets by the railroad under the statute necessarily carries with it the power to change those terms by subsequent agreement. In-

deed this is clearly implied in the case cited. The subsequent ordinance rescinding the original contract was void because it had not the assent of the railway company. Clearly with such assent the City could modify or abrogate the contract. Indeed this follows from the very nature of a contract. As to the suggestion that the power of the city to improve streets notwithstanding the location of the railroad in them is recognized in the Carthage case, we have to say that in that case this power to improve was expressly reserved by the proviso in the original contract. In any event if the City had power to make the contract, it could not thereafter exercise any alleged right inconsistent with the terms of the contract In an unreported case in the United States Circuit Court for the Northern District of Ohio, Mr. Justice (then Judge) Jackson, had occasion to pass on the applicability of this section 3283, to the very ordinance of 1887 under which these identical bridges at Defiance were constructed and its effect. The case arose on an intervening petition filed in the Wabash foreclosure suit by one Adams, a property owner whose property had been damaged by the raising of the level of the road to form the approaches to one of the new bridges. The answer of the railroad set up the ordinance of 1887 and plead the two year statute of limitations provided by section 3283. If there was a contract between the city and the railroad then this short period of limitation applied and the action was barred; otherwise the limitation was at shortest four years and the action was brought in due season. The matter was fully considered and in an opinion written in his own hand Judge Jackson, held (on demurrer to the answer) that the bridges were built under an agreement with

the City authorized by section 3283 and therefore the two year limitation applied to the case. We append a copy of the opinion.

If the section were not applicable or there had been no valid agreement a longer period of limitation would have prevailed.

And in so holding, Judge Jackson only followed the decisions of the Supreme Court of Ohio.

In Railway Co. vs. Mowatt 35 O. S. 287

it was expressly decided that an agreement between a City and a railroad to rebuild a bridge and extend the approaches to make room for an additional track was within the provisions of this very section 3283.

And in

Railway Co. vs. Cobb 35 O. S. 94

it was held that for lack of agreement with the City, in a similar case, the two year limitation provided by this section was not applicable.

The case of *Philadelphia W & B R R Co 121 Pa St 44* is in all essential respects identical with the case at bar. It was there held that when a public highway crossed the railroad track by means of an overhead bridge which had been constructed by the railroad company under an agreement with the city, the street could not afterwards be reduced to grade.

The Court say:

"Does the act (i. e. the act of the legislature conferring authority on the City) confer the power to make the contract? If it does there is an end to the discussion."

The Supreme Court of Ohio commenting on this case

in its opinion in the case at bar says: (Rec. p. 91).

In the Pennsylvania case the City of Chester, under a special act of the legislature authorizing it to do so, entered into a contract with the railroad company to establish the grade of a street about to be opened, eighteen feet above the railroad track and the Company agreed to construct a bridge over the track. The act declared that the contract when made, should be as valid and effectual to transfer the rights and privileges therein contracted for to the railroad company, as if made between individuals; and it further authorized the company to maintain its bridge so long as the street remained open. In the decision of the case, stress is placed upon these provisions, the first of which put the contract on the same footing as agreements between individuals, and took it out of that general rule applicable to agreements of municipal bodies which leaves them at liberty to exercise their legislative powers whenever necessary for public purposes, and the latter expressly fixed the duration of the contracs which, having been made in execution of the power conferred by the statutes, was intended to be as comprehensive as the statute permitted."

But the provision that the agreement when made should be as binding as if made by individuals adds absolutely nothing to the power conferred. If the act confers power to make the contract, it is as a matter of course as binding as if made by individuals. If the power is not conferred there is no contract at all. There is as a matter of law no "general rule applicable to agreements of municipal bodies which leave then at liberty to exercise their legislative powers," so as to abrogate agreements made by them within the scope of power granted them.

Says Mr. Dillon *Municipal Corporations, 4th edition p 472 (note.)*

Corporations may make contracts within the powers expressly granted by the acts of their creation and the implied powers incidental and necessary to the execution of such expressed powers and the performance of the duties

enjoined upon them. For these purposes it will be bound to perform them as the same as individuals."

See also same authority §§ 705, 706.

The "general rule" referred to by the Court below has no existence save perhaps as it may be said to exist (temporarily) in Ohio by virtue of the decision we are now seeking to reverse.

The only difference between contracts by municipal corporations and those made by individuals is that the former are subject to the proper exercise by the municipal corporation of its police power. If *public safety, health or morals* require a change in the contract the municipal corporation may make such change. But there can be no pretense here that the change was made necessary by considerations of public safety, health or morals.

The case was decided on the ground that the City has always the power to change the grade of the streets, even to the abrogation of existing contracts; although the change is made simply to subserve the supposed convenience of the public. There is a clear distinction between the exercise of such power in the interest of public safety, health or morals; and its exercise in the interest of public convenience. This is recognized by the cases in this court.

See:—Beer Co. vs. Massachusetts, 97 U. S. 25, 32.
Fertilizing Co. vs Hyde Park, 97 U. S. 659, 663.
Stone vs. Mississippi, 101 U. S. 814.
Butchers Union vs Crescent City Co. 111 U. S. 746.

These cases are reviewed and distinguished in,

New Oreleans Gas Co. vs Louisana Light Co 115 U. S. 650.

The ordinances of 1893 in the case at bar were passed under the pretense of making a change of grade in the

streets. This was not in any sense an exercise of the *police power*.

By affirming this judgment this court will put the seal of its approval on the doctrine that a contract made by a municipal corporation within the scope of powers expressly granted it by the legislature, based upon a valuable consideration actually paid by the other party who has fully performed his part of the contract, may nevertheless be abrogated by the simple *fiat* of the city authorities, simply because they have changed their minds as to the desirability of the contract.

The decision of Judge Goff in:—*Baltimore Trust & Guarantee Co vs Mayor, etc. of Baltimore, 64 Fed. Rep. 153*, sustains our position fully. The syllabus of the decision is as follows:

Municipal corporations invested with full power to control and regulate the use of their streets, do not exceed their powers in making, by ordinance, irrepealable contracts not exclusive in character, for the use of such streets for purposes of public comfort and convenience.

A legislative grant, made either directly by the legislature, or indirectly through a municipal corporation duly authorized so to act, and excepted by the grantee, constitutes a contract the terms of which cannot be altered, without the mutual consent of the parties, except as the right to repeal or alter is reserved in the enactment itself, or existed in constitutional or legislative provisions; and an impairment of such a contract by a law of the state passed by the legislature, or by a municipality authorized by it, or acting under a statute supposed to give the power, is a violation of section 10, art. 1 of the Constitution of the United States.

"The City Council of B. whose general powers included the power to exercise full control over the streets of the City and regulate their use, by railway tracks, passed an ordinance granting leave to a street railway company to construct tracks in certain streets including a double track in L. street, upon certain conditions to be performed by the

Company, which ordinance was accepted by the Company. Subsequently, the state legislature, in view of a doubt of the authority of the City Council to pass such ordinance, ratified the same by on act which also provided that the City Council should have the same power in reference to its amendment or repeal as it would have in respect to an ordniance passed under its general powers. The railway company mortgaged its railway and railway tracks including the line authorized by said ordinance to the complainants, to secure an issue of bonds, and proceeded to construct the line. While the construction was in progress the City Council of B repealed so much of the ordinance as authorized a double track on L Street. *Held*, that such ordinance having been accepted by the Company, constituted an inviolable contract between the municipal corporation and the company; and since the general powers of the City Council, as above stated, did not include power to repeal an ordinance creating a contract, and as a ratifying act gave no power to repeal beyond the general powers, the repeal was an impairment of such contract, and a violation of section 10, Art. 1 of the Constitution of the United States."

In the case of the *City of Indianapolis vs Consummers Gas Company*, 140 Ind. 107. NOTE 113 (39 N. E. Rep. 433.)

It was held that where a city in the exercise of its statutory power over the streets passes an ordinance granting to a gas company the privilege of using the streets for the distribution of gas, and requires it to pay for the franchise, such ordinance, when accepted by the company, constitutes a contract, and the impairment of such a contract by a subsequent ordinance prohibiting the cutting into paved streets without the consent of the city council is not a valid exercise of the City's police power.

The Court in that case says:

"It is not controverted by the appellant's learned council that this ordinance, when accepted by the gas company, constituted a contract, and was binding upon both the company and appellant. It was what is termed a legislative contract', and as such came within the provisions of that clause of the constitution of the United States which forbids the impairment of the obligations of a contract. It invested the appellee with the right of property in the franchise

granted, which appellant—unless the right was reserved—could not take away or impair, without appellee's consent by any subsequent act. Dartmouth College v Woodward 4 Wheat. (U. S.) 518; Mayor, etc., v. Second Ave R Co 32 N. Y. 261."

"But the appellant contends that such grants are but the exercise of police power, and may be changed or repealed by the granting power. It is true that, in grants to persons or corporations to supply gas and the like to inhabitants of towns or cities, the municipality does not part with or bargain away its rights, under the police power to protect the public health, the public morals, and the public safety, as the one or the other may be affected by the exercise of the franchise by the grantee. New Orleans Gas Co. vs. Louisiana Light Co. 115 U. S. 650; 6 Sup. Ct Rep. 252; Beach on public corporations, sec. 713, 990, 1229, 1230.

In the case of the City of Indianapolis vs Indianapolis Gas Light and Coke Co., 66 Ind. 396, it was contended, upon the part of the city, that the contract in controversy was a restriction upon the legislative power to regulate the lighting of the streets. But this court, in that case, drew the distinction between the legislative and contractual powers of municipal bodies as follows: 'These two powers need not be confounded. The exercise of the legislative power requires the consent of no person, except those who legislate, while it is impossible to make a contract without the consent of another or others. We think, therefore, that when the City of Indianapolis made the contract in question with the gas light company, it made it in the exercise of its power to contract, and not in the exercise of its power to legislate, although the power to make a contract was authorized by an ordinance; having the power to make a contract touching the subject matter, it had the right to make it according to its own discretion as to its prudence or good policy, within the limits of its franchise. Nor can we see that the contract in the least restricts the legislative powers of the City, except that, as the sancity of the contract is shielded by the constitution of the United States, it cannot in the exercise of its legislative power, impair its validity; for it would be a solecism to hold that a municipal corporation can impair the validity of a contract, when the state which

created the corporation by its most solem acts, has no such power." Respectfully submitted by

ALEXANDER L. SMITH,
of Counsel for Plaintiff in Error.

COPY OF OPINION OF JUDGE JACKSON REFERRED TO IN THE BRIEF.

UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION.

James R. Jesup, et al
vs.
The Wabash, St Louis, & Pacific Ry. Co., et al. } In Chancery, No. 552.

This cause is now before the Court on demurrer of intervening Petitioner J. Q. Adams to the answer of the Wabash Railroad Co., opposing the allowance of his claim for damages for alleged injuries to his property by reason of acts on the part of the Receiver herein, and also upon application of said Wabash R. R. Co. to dismiss the petition of said Adams.

It appears that the Receiver, McNulta, while in charge of the Wabash, St. Louis & Paciffc Ry. Co. under the foreclosure proceedings in the above entitled cause, made certain improvements under proper municipal license and authority of the city of Defiance, Ohio, upon one of the streets of said city on which the property of said Adams abutted, said improvements consisted in raising the road bed or tract of said railway about four feet in front of petitioners premises, which he claims were thereby injured and he seeks to have an order on the Wabash Railroad Co. the purchaser at the

foreclosure sale, to pay his damages for said injuries inflicted by the Receiver's alleged wrongful act. The change in the grade of the street complained of was made and completed prior to March 1, 1888. By section 3283 of the Revised Statutes of Ohio it is provided that railroads, making such improvements or laying their tracks upon streets "Shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by *civil action brought by the owner*, before the proper court, at *any time within two years* from the completion of such track." In the case of Columbus, Springfield & C Railroad vs Mowatt 35 Ohio St 284-287 the Supreme Court of Ohio construed this statute and held that it prescribed a limitation of two years within which the owner of private property must sue in order to recover damages for injuries such as petitioner complains of. The petitioner instituted no suit against the Receiver within two years prescribed by the statute and his petition was not presented to this Court asking for an allowance for his injuries *until April 3, 1891*, more than three years after the work was completed. The Wabash R. R. Co. insists that his claim is barred by said limitation of two years. In the opinion of this Court this is a valid objection and defense to the petitiener's claim and his demurrer to the answer setting up said defense is not well taken and should be over-rulled.

But aside from this defense, it appears from the record herein that the foreclosure sale made under the proceedings in this cause, was confirmed May 16th 1889 and that the purchaser, (The Wabash R. R. Co.) was placed in possession of the property in July 1889, the Court reserving the power to require it to pay such claims as might be there-

after allowed by it as proper demands against the Receiver. On August 7, 1889 the following order was made by the Court, viz: "It is ordered that the Receiver do forthwith give public notice by advertisment to be published in each of the Cities of Toledo, Ft. Wayne, Chicago, Springfield and St. Louis, that all claims against the Receivership be presented and filed with John McNulta, Receiver on or before November 15, 1889." This publication was duly made and the Receiver was subsequently and after November 15, 89 discharged. The petitioner Adams does not appear to have availed himself of this notice, but files his petition herein April 3, 1891 bringing forward his claim for the first time. He offers no reason for not having sued the Receiver and gives no excuse for not sooner presenting his claim to this Court. The Receiver, who committed the alleged wrongful acts, as well as the Wabash, St. Louis & Pacific Railway Co. whose property he had in custody as the officer of the Court, has passed out of existence, or is no longer before the court to make resistence to or explanations of the petitioner's claim. The purchaser of the property formerly in possession of the receiver is in no way personally liable for petitioners alleged injuries and while under the power reserved to the court, the purchaser could be made to pay petitioner's claim, the question is, should the Court under the facts and circumstances of the case and in view of petitioners unexplained delay direct its payment, even if it were clearly established. The Court is of the opinion that the Wabash R. R. Co. is entitled to interpose against the allowance of petitioner's claim any and all defenses and objections which the Receiver might have presented and that said

Receiver could properly have defeated its allowance on either or both the grounds above indicated.

It follows that the petition of said Adams should be dismissed at his costs and it is accordingly so ordered.

HOWELL E. JACKSON,
Circuit Judge

Receiver could properly have defeated its allowance on either or both the grounds above indicated.

It follows that the petition of said Adams should be dismissed at his costs and it is accordingly so ordered.

HOWELL E. JACKSON,
Circuit Judge

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IN THE

Supreme Court of the United States.

October Term, 1896.

NO. 239.

Office Supreme Court, U. S.
FILED.
MAR 3 1897
JAMES H. McKENNEY,
CLERK.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error,

vs.

THE CITY OF DEFIANCE,
Defendant in Error.

In Error to the Supreme Court of the State of Ohio.

BRIEF FOR DEFENDANT IN ERROR.

W. H. HUBBARD, Counsel.

THE LANING PRINTING CO., NORWALK, OHIO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 239.

THE WABASH RAILROAD COMPANY,
Plaintiff in Error.
vs.
THE CITY OF DEFIANCE,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

Brief of Defendant in Error.

ARGUMENT.

I.

The defendant in error maintains that there is but one federal question arising upon the record in this case.

This is the question arising upon the averment of the plaintiff's petition, originally filed in the Court of Common Pleas, on which the case was tried and determined by the Circuit Court of Defiance county, on appeal from said Court of Common Pleas, as follows:

"Plaintiff further says that the ordinances last named of said cit council of Defiance impair the obligation of the co

tract made by the city with said receiver in said first named ordinance, and the acts of the said receiver and plaintiff thereunder; and as such are in contravention of the provisions of section ten (10), of article one (1), of the Constitution of the United States; but that, as your plaintiff is informed, and believes, said city and its officers and agents now give out and claim that said ordinance of 1887, is of no binding force or effect, and conferred no rights upon said receiver, and therefore affords no protection to plaintiff in the premises." Print. Rec. 16.

In no other respect was it charged in the petition that the ordinances of 1893, were, or, if carried into effect, would be contrary to the provisions of the Constitution of the United States. Print. Rec. 9 to 17, incl.

The record does not show that it was set up or claimed by the plaintiff, in the trial court, that either the making or enforcement of said ordinances of 1893, or the refusal of said trial court to hear the opinion evidence of the so-called experts, as to the effect of the enforcement of said ordinances, was in contravention of the provisions of the 14th amendment of the Constitution of the United States, whereby said state of Ohio is forbidden to "deprive any person of * * * property, without due process of law." See bill of exceptions, Print. Rec. 27 to 67 incl.

It nowhere appears in the record that any other "title, right, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, was denied by the trial court, or was set up or claimed by the plaintiff, in said trial court; save only that said ordinances of 1893, if carried into effect, would be in contravention of the provision of section 10, of article 1, thereof, that, "No state shall * * * pass any * * * law impairing the obligation of contracts."

On the contrary, it appears from the certificate of the Cir-

cuit Court, in its entry of final judgment, on the trial on appeal, in that court as follows:

"And thereupon, on request of the plaintiff, the Court finds that a federal question was raised in the case on the final trial thereof, by the plaintiff, *both in its petition*, to the effect that said ordinances of the said city of Defiance, if carried into effect, would be in contravention of the provisions of the Constitution of the United States, and especially of article 1, section 10, thereof, *and also in argument* by plaintiff's counsel, fully set forth in their brief and contended for by them, that said questions were necessarily involved in the decision of this case, and that the Court decide the said federal question and constitutional points against the contention of the plaintiff." Print. Rec. 26.

Under the law, as laid down by this Court in the case of *ex parte* Spies and others, partially quoted by counsel, in plaintiff's brief, the foregoing is the only alleged error in the state courts, which this Court has jurisdiction to review. We quote the rule as stated by the Court, more fully, as follows:

"To give us jurisdiction under section 709, Rev. Stat., because of the denial by a state court of any title, right, privilege, or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear that such title, right, privilege, or immunity was 'specially set up or claimed' at the proper time, and in the proper way. To be reviewable here the decision must be against the right so *set up or claimed*. As the Supreme Court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of the waiver of the right under the constitution, laws, or treaties of

the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned." 123 U. S. 167 and 181.

It is true, that the plaintiff, in its original petition, did especially charge the matters set forth on page 5, of its brief in this court, but the title, right, privilege, and immunity thereby set up and claimed, was under the Constitution of the State of Ohio, and not under the Constitution of the United States, as fully appears by the whole averment, which we quote, but only part of which is set out in plaintiff's said brief. The full averment is as follows:

"The defendant recognized and agreed with this plaintiff that the grade of both of said highways was and should be thereby established and fixed at the height of twenty-one feet above the plaintiff's said track, and that the defendant is thereby estopped from requiring this plaintiff to remove its said overhead bridges and to construct grade crossings of said highways over its said track. That further the grading down of said highways as proposed by the said ordinances for that purpose will be an appropriation of the plaintiff's property, and will also cast an additional burden upon the plaintiff in the establishing and maintaining of new grade crossings over its said track, for which no compensation has been provided in money for the plaintiff, and no tender thereof made to the plaintiff, *without which first being done the carrying out of said last named ordinances will be contrary to the provisions of the constitution of the state.*"

The words italicised are omitted from the quotation in the plaintiff's brief. Print. Rec. 15 and 16.

We also strenuously deny the claim of the plaintiff, made on page 26, of its brief herein, that a federal question as to the rejection by the trial court, of the testimony of witnesses

offered by the plaintiff, to prove that, in their judgments or opinions, the crossings would be dangerous, etc., if constructed in conformity to the ordinances of 1893, is properly made or saved upon the record, by the mere exceptions of the plaintiff, to the exclusion of such testimony, without any statement of the grounds of such exceptions; it nowhere appearing in the record, that the plaintiff set up or claimed on the trial of said cause in said trial court, any right to introduce such testimony, under any provision of the Constitution of the United States, or that the exclusion or rejection of such testimony was in contravention of the 14th amendment of the Constitution of the United States, that no state shall deprive any person of property, without due process of law, or of any other provision of the federal constitution.

The said claim that a federal question is involved in the rejection of this evidence, is made for the first time in this court; for it appears by the certificate of the Supreme Court of Ohio, that it was not even set up or claimed in that court. Print. Rec. 6 and 7.

We, therefore, confidently claim that the only alleged error arising upon the record in this case, which this court has jurisdiction to hear and determine, is the one made by the first and second of the plaintiff's assignments of error, appearing on page 3, of the printed record herein; and which are argued by plaintiff's counsel, on pages from 12 to 19, inclusive of its brief, and also in its supplemental brief, herein.

II

But, however the Court may hold as to what alleged errors of the state courts is reviewable by this Court, upon the record in this case, we maintain that the whole controversy finally turns upon the decision of this Court, as to the nature, effect,

scope and validity of the so-called ordinance of December 20, 1887.

It is this ordinance, and the acceptance and performance by the receiver and said plaintiff, of the terms and provisions thereof, to be performed by them thereunder, which the plaintiff alone relies upon, as constituting the alleged contract between it, and said city and its counsel, whereby it claims to derive the right to perpetually maintain the present bridges, or other bridges of like kind and height above its track, as the means of conducting said streets and public highways over and across its said railway.

It is solely by virtue of this ordinance of 1887, and the said acts of said receiver and plaintiff, that said plaintiff claims said city and its council to be estopped from doing away with said bridges, and said crossings over said railway, by means thereof, by the exercise of legislative power, by and under the ordinances of 1893, to reduce the said streets and highways to the level of said plaintiff's track, at said crossings, and constructing said crossings over said railway, at grade.

It is solely by virtue of this alleged contract and estoppel, founded upon said ordinance and acts of said receiver and plaintiff, that said plaintiff claims to have acquired such a right or franchise to perpetually maintain such bridges and crossings in the manner in which they now exist, as constitutes property of said plaintiff, of which it claims that it will be deprived, by the state of Ohio, without due process of law, by the enforcement of said ordinances of 1893, and by the exclusion and rejection of the opinion evidence offered by it, on the trial of said cause in the Circuit Court of Defiance county.

This so-called ordinance of 1887, is the only act of the City of Defiance, or its council, from which the plaintiff claims to

have derived any title, right, privilege, or immunity, under the Constitution of the United States.

Unless, therefore, this Court shall determine that the state courts erred in deciding adversely to the claim and contention of the plaintiff, upon the question of the nature, effect, scope and validity of said ordinance of 1887, this court cannot do otherwise than affirm the judgment and decision of the Supreme Court of Ohio, affirming the judgment of the Circuit Court of Defiance county.

The defendant maintains that the state courts did not err in this behalf, for the following reasons:

1. There never was any consideration moving to the public, or to the city, for the passage of the ordinance of 1887, or for the permission claimed to be thereby granted to the railroad company, or its receiver, to erect and maintain the present bridges.

The claim of the plaintiff that the agreement of the railroad company to construct and maintain its sidewalks on each side of the bridges, and the construction thereof in conformity with the terms of said ordinance constitutes such a consideration, is without foundation.

At the time of the construction of the railway, these crossings were outside of the territorial limits of the village of Defiance, and there was no sidewalk constructed on either side of either of said highways. Such being the case, the company constructing the railroad, under its statutory duty to "place such road in such condition as not to impair its former usefulness," constructed the original bridges with a roadway merely, and without any sidewalk on either side of either of said bridges.

When said crossings and the territory adjacent thereto, were brought into the limits of such village, about or shortly

before the year 1876, the care, supervision and control of said highways and bridges passed out of the county commissioners and vested in the council of said village under the provisions of section 2640 of the Revised Statutes of Ohio, which was and is as follows:

"Section 2640. The council shall have the care, supervision and control of all public highways, streets, avenues, alleys, sidewalks, public grounds, and bridges, within the corporation, and shall cause the same to be kept open and in repair, and free from nuisance."

And under the provisions of the law then existing, which now appears as sections 2328, 2329 and 2330, the power vested in the council, to compel the owners of property abutting on said highways within the territorial limits of the village to construct sidewalks on said highways along and in front of such abutting property, or in default of the construction thereof by the owners to construct the same and levy an assessment upon the property of such owners to pay the costs and expense of constructing the same.

Said sections are as follows:

"Section 2328. The council shall provide, by ordinance, for the construction and repair of all necessary sidewalks within the limits of the corporation."

"Section 2329. When the council, board of improvements, or board of public works, as the case may be, declares by resolution, that certain specified sidewalks shall be constructed or repaired, the mayor, or board of public works, where there is such a board, upon being advised thereof, shall cause a notice to be served upon the owner, or agent of the owner of the property bounding or abutting on such sidewalks, of the passage of such resolution; and if it appear in the return made by the mayor, board of public works, or otherwise, that such person cannot be found, notice thereof shall be given by pub-

lication in some newspaper of general circulation in such city, for four consecutive weeks."

"Section 2330. If such sidewalks are not constructed within sixty days, or repaired within fifteen days from the service of the notice, or completion of the publication, the council, or board, may have the same done at the expense of the owner; and such expense shall constitute a lien upon the property bounding or abutting thereon, and shall be collected in the same manner, and with the like penalty and interest, after demand and non-payment, as in other cases of improvement."

The company then owning the railroad was the owner of its right-of-way abutting on both sides of each of said highways, which had become streets of said village, and as such should have been compelled to construct the sidewalks as part of the new bridges built in 1876.

Instead of that, however, in some manner, it procured the council to pass the so-called ordinance of 1876, whereby it graciously accorded to the village the permission to perform the duty which should have been imposed upon it of constructing and maintaining a sidewalk on said bridge over its railway on Holgate Pike, and now claims the release of this pretended contract, together with the construction of the sidewalks on the present bridges, which the council might at any time compel it to construct and maintain to be a consideration for the permission granted by the ordinance of 1887 to raise and maintain said bridges at their present height to the practical destruction of the use of said highways by the public.

2. These highways and bridges were, therefore, by the terms of the statute, within the exclusive care, supervision and control of the council of the defendant in error, and it was thereby made the duty of said council to keep the same open and in repair and free from nuisance. This was a legislative power and duty vested in and imposed upon said council.

By section 1692, R. S., it is provided that cities and villages shall have the power to lay off, establish, open, widen, narrow, straighten, extend, keep in order and repair streets and bridges within the corporation, and that the council may provide for the exercise and enforcement of the same.

By section 2263, R. S., it is provided that when the corporation is possessed of property which it desires to improve for street purposes, the council may assess the cost and expenses of the improvement, or of any part thereof, upon the general tax list, in which case the same shall be assessed upon all taxable real and personal property in the corporation.

Section 2301, R. S., provides that when a street or public highway, within the corporation is graded, and the expense is assessed on the abutting lots or lands, the owners shall not be subject to any special assessments occasioned by any subsequent change of grade in such street or public highway, unless a petition for such change is subscribed by a majority of the owners of such lots or lands; and the expense of all improvements occasioned by such change of grade not petitioned for, shall be chargeable to the general fund of the corporation.

By Sec. 2302, R. S., of the chapter including the two sections last above cited, it is provided that, "the provisions of this chapter shall embrace territory added to the corporation by annexation and otherwise."

By these sections the council is clearly granted power to establish the grade of any street or highway within the corporate limits or to change the grade so established and establish a new grade in such street or public highway, and to improve the same by making such street or highway to conform to the grade so established, by excavating or filling up the surface, as may be required. This power is necessarily included in the grant of power contained in section 1692, and

by section 2640 is to be exercised by the council. It is a continuing power to be exercised from time to time, whenever in the opinion of the council the exercise thereof is necessary.

It was early held by the Supreme Court of the United States, in the case of Smith v. the Corporation of Washington, 20 Howard, 135, that :—

"Streets cannot be opened and kept in repair, or made safe or convenient for public use, without being made level, or as nearly so as the nature of the ground will permit. Hills must be cut down and hollows filled up, or, in other words, the roads must be 'graded' or 'reduced' to a certain degree of ascent or descent, which is the proper definition of the verb 'to grade.' If the duty imposed on the corporation requires this to be done, the power must be co-extensive with the duty. If charged with the neglect of their duty as public officers, bound to keep the streets in repair, it would not be a sufficient excuse to allege that the fences and obstructions are removed, and therefore, the street is opened, or, that it has been kept in as good repair as it was found. A Court of Quarter Sessions would probably not receive a defense founded on such astute philological criticism of the terms of the statute; nor could the allegation be admitted that once having fixed the grade which is now found improper, and insufficient, the corporation has exhausted its power, and has no authority to change the level or grade, in order to keep the street in repair. As the duty is a continuing one, so is the power necessary to perform it.'

And this power of the council has been recognized by the Supreme Court of Ohio, in a large number of decisions, from among which we cite the following:

Goodlow v. City of Cincinnati, 4 Ohio, 500.
Smith v. City of Cincinnati, 4 Ohio, 514.
Crawford v. Village of Delaware, 7 O. St., 460.
McCombs v. Town Council, Akron, 15 Ohio, 475.

Town Council of Akron, v. McCombs, 18 Ohio, 229.
Street Railway v. Comminsville, 14 O. St., 523.
City of Cincinnati v. Penny, 21 O. St., 499.
City of Youngstown v. Moore, 30 O. St., 133.
Keating v. The City of Cincinnati, 38 O. St., 141.
Akron v. Chamberlain Co., 34 O. St., 328.
Lima v. The Cemetery Association, 42 O. St., 128.
Cincinnati v. Whetstone, 47 O. St., 196.
Cincinnati v. Sherike, 47 O. St., 218.

There can then be no doubt that, at the time of the passage of the resolutions and ordinances set forth in the answer, the city council of the defendant in error had the exclusive care, control and supervision of these streets, highways and bridges, within the city limits, and, unless deprived of it by the ordinance of 1887, set up in the petition, had full and ample power to improve said streets and highways in such manner as it deemed necessary, either by establishing a grade, or new grade, and excavating the surface of the streets to the grade so established, or in any other manner that it deemed proper.

And it can make no difference that to carry out the improvement provided for, the bridges must be taken down and removed.

These bridges, although constructed by the receiver, are no part of the railroad. They are parts of the streets.

"At common law a bridge is a part of the highway which it serves to make more serviceable to the public, and this is the general rule in this country." 2 Beach, Pub. Corp. No. 1470.

Citings:—

Rex. Sainthill, 2 Ld. Raymond, 1174.
Westfield Borough v. Tioga Co., 150 Penn. St., 152.

Rapho Twp. v. Moore, 68 Penn. St., 404.
Penn. Twp. v. Perry Co., 78 Penn. St., 457.
Comm'rs v. Bridge Co., 12 Cushing, 243.

"In this country a bridge means any structure by which a highway is carried over a place, unless the term is limited by a statute or by some local usage or agreement." 2 Beach Pub. Corp. 1470.

Citing:—

Whitehall v. Gloucester, 40 N. J. L., 302, 305 and 306.

"A street is only an improved public way through a town or city, and whether the way rests immediately upon the solid ground, or is supported above it like a bridge, it may still be called a 'street'."

Read v. the City of Camden, (N. J. Err. and App., 1892), 24 Atl. Rep., 549.

If the ordinance of 1887, purports or was intended to have the effect contended for by the plaintiff, it would be an attempt by the city council to barter and cede away legislative power delegated to it by the general legislative body of the state, and attempt to absolve itself of the duties imposed upon it by such legislative body for the use and benefit not only of the City of Defiance, but also of the public in a larger sense, for these highways and the bridges forming part thereof, are not only parts of streets in the City of Defiance, but they are also parts of state and county roads.

If said ordinance is to have this effect, it is absolutely void in that respect.

"Powers are conferred upon municipal corporations for public purposes, and as their legislative powers cannot, as we have just seen, be delegated so, *they cannot, without legislative authority, express or implied, be bargained or bartered*

away. Such corporations may make authorized contracts, but they have no power, as a party, to make contracts or pass by-laws, which shall cede away, control or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties." 1 Dill. Mun. Corp., Sec. 97, and authorities cited in note 3.

"Contracts to violate the charter or to bargain away or restrict the free exercise of legislative discretion vested in a municipality or its officers in reference to public trusts, are void."

Thomas v. Richmond, 12 Wall, 349. (1870.)

Jackson v. Bowman, 39 Miss., 671. (1861.)

Indianapolis v. Indianapolis Gas Co., 66 Ind., 396.

Cited from Note 1 Dill. Mun. Corp., Sec. 447.

"So a contract by a city to waive its right to go on with the laying out of a street or not, as it might choose, is, it seems, against public policy, and it is void if it amounts to a surrender of its legislative discretion."

1 Dill. Mun. Corp., Sec. 458, and authorities there cited.

The power to improve and grade streets is a continuing and inalienable power.

1 Dill. Mun. Corp. Sec. 685.

"The powers of a municipal corporation in respect to opening, improving and controlling its streets, are held in trust for the public benefit, and cannot be surrendered by contract to private persons, or to a corporation, by resolution of the common council, or in any other manner."

2 Beach on Pub. Corp., Sec. 1208, page 1196.

So in the article on Municipal Corporations, Am. and Eng. Ency. of Law, Vol. 15, pages 1042, 1043 and 1045, it is said:

"The general legislative power residing in the state government, may delegate to a municipal corporation some portion of its own power, which are held in subordination to the general power. But these delegated powers given for local objects are regarded as trusts confided to the hands in which they are placed, and are not subject to be delegated by the repositories of them. The rule is plain then, that the legislative power of a municipal corporation cannot be vicariously exercised. * * * Closely related to the foregoing rule is the principle that a municipal corporation cannot divest itself of the legislative discretion conferred upon it by law; it cannot surrender it by contract nor bind itself not to exercise it whenever it may become necessary. It is important that this principle be strictly observed in order to prevent legislative powers essential to the preservation of populous communities from being frittered away into perfect insignificance."

And see the vast number of authorities supporting these propositions, cited in notes, on pages 1045 and 1046.

"A city by permitting a railroad company to use one of its streets, by building its track thereon and running its cars through it does not part with its right to control such street, for, without some special legislative authority, it cannot make any such grant to a railroad company, if the effect of such grant would be to relinquish its own control over such street, or to abandon its duty to keep the same in repair. The privilege of a railroad company to lay down and use a track in a street of a city is not exclusive, but must be exercised in common with the general public. The streets are held in trust for the public use, and are public for all purposes of free and unobstructed passage. For those purposes a city may improve and control them and adopt all needful rules and regulations for their management and use, but cannot alien or otherwise dispose of them."

2 Beach on Pub. Corp., No. 1221, pages 1207 and 1208, and note.

"The permission given a street railway company to occupy streets is subordinate to a municipality statutory and corporate powers respecting the use, control and regulations of streets. The right of public supervision and control of highways results from the power and duty of providing and preserving them. The charter of a city generally commits the regulation supervision and control of its streets to the common council. It empowers the council to improve the same and determine the nature and details of such improvement. The council is given the power to control, prescribe and regulate the manner in which the streets shall be used and enjoyed. These powers are held in trust for the public benefit and cannot be surrendered or delegated to private parties. All franchises granted or contracts made with reference to the use of streets must be made, not only with due regard to their lawful and proper use by others, but subject to the exercise by the municipality of the foregoing powers. A city is not under obligations to conform its treatment of its streets to the construction of a railroad company's roadbed, but, on the contrary, the company must conform the construction of its roadbed to such reasonable regulations as are made by the municipality in the reasonable exercise of its powers respecting the use, control, regulation and improvement of its streets. Street railways occupy public streets subject to the use of such streets by the public, subject to such burdens as may be made necessary by reason of the improvements of such streets, and subject to such changes in the construction of roadbeds as improved and changed conditions may demand."

2 Beach on Pub. Corp. No. 1222, page 1208, and note 1.

"The permission given a street railroad company by a city to occupy streets is subordinate to the city's statutory and corporate power respecting the use, control and regulation of streets."

City of Detroit v. Ft. Wayne & E. Ry. Co. (Mich.), 51 N. W., 688. Cited from Am. Digest Annual, 1892, page 3634, No. 439.

"The right of a railroad company to run its trains across a street is strictly subordinate to the public right of ordinary travel. Houston & T. C. Ry. Co. v. Carson, (Texas) I. S. W. 107, 66 Texas, 345." Cited from Am. Dig. 1890, page 2663, No. 288.

"Grand Rapids v. Grand Rapids & C. R. Co., (1887), 66 Mich. 42, 33 N. W. Rep. 15, in which case a contract which the railroad company claimed existed between the city and itself, that the city would not open a street across its track, was held to be void on the ground that the laying out and opening of streets by the common council of a city is the exercise of its legislative functions, and any contract made by the city with an individual or corporation, by which it agrees that it will not in the future open or extend a street in any particular place or part of the city, is an abnegation of its legislative power, unauthorized by its charter, and may be alike destructive of the convenience and prosperity of the municipality."

See also Dillon on Munic. Corp. (4th ed.), No. 716.

Davis v. Mayor, 14 N. Y., 506, 532.

People's Railroad v. Memphis Railroad, 10 Wall., 38.

2 Beach on Pub. Corp. page 1196, note 1.

"A contract with a gas company based on a valid consideration, allowing the company to lay its pipes in the streets of a city, does not divest the municipality of the power to lower the grade of its streets, and if necessary, to remove as nuisances the pipes thereby exposed to view, for the reason that a municipal corporation cannot alienate the express and plenary powers to grade and improve its streets granted to it by the legislature. And of the necessity and expediency of removing as nuisances gas pipes from a street there exposed to view by the change of grade, the municipal council and not the court is the judge. A city is not deprived of the power to make necessary improvements in one of its streets on which are the tracks of a railroad company by the fact that the railroad company agreed to so improve it that vehicles might

cross it safely. And an ordinance for the improvement of a street is not void because of the possible injury to vested rights by its enforcement."

2 Beach on Pub. Corp. pages 1082 and 1083, No. 1086.

"The power to grade and improve streets is conferred upon municipal authorities for the public benefit. It is a continuing power and is not exhausted by the first exercise of it; nor can it in the absence of statutory authority, be ceded or bargained away; nor can one council, by its exercise, abridge the capacity of its successors to perform their duties in that behalf as the public interest may demand. A gas company laying its pipes in the streets of a city, under a grant from a city, in conformity with an established grade, does so subject to the right of the city to change the grade of the street whenever the necessities of the public require it; and in the absence of wantonness or negligence on the part of the city, the company cannot maintain an action for damages occasioned by the necessity of taking up and relaying its pipes in order to accommodate them to a new grade."

The Gas Light and Coke Co. v. The City of Columbus, 50 O. St., 65. See also opinion by Spear, C. J.

"The grant from the city under which the railroad company claimed is 'the right and privilege of using' the street in question, 'for the use and construction thereon of as many railroad tracks, side tracks, switches, and frogs as may be necessary for the convenience of said company in the transaction of their business,' etc. Held, that by such grant the fee of the street remained in the city. While the fee of the street remains in the city, it may by special tax, make the necessary improvements therein. The fact that a railroad company agreed to so improve the street on which its tracks are laid that vehicles may cross in safety does not deprive the city of the power to make such improvements. An ordinance

for the improvement of a street is not void because of the possible injury to vested rights by its enforcement."

Chicago, B. & Q. Ry. Co. v. City of Quincy (Supreme Court of Illinois, Nov. 2, 1891) 28 N. E. Rep. page 1069.

And we quote from the opinion of the court by Scholfield C. J.

"It is also matter of common observation that often, to improve one part of a street so as to make it conform to the requirement of the public necessity, it is indispensable that the street be improved in its entire width, for otherwise there will be want of necessary correspondence and uniformity. The duty of the city, under its power to repair and improve streets, is to fit them for every use contemplated in such way as to best promote the general welfare. Railroad Co. v. People, (Ill. Sup.) 27 N. E. Rep. 200. The city must therefore have the right to improve the parts of the street used by appellant as well as the other parts, and its judgment of the necessity and character of the improvement, in the absence of evidence of bad faith, must be conclusive. Railroad Co. v. People, supra. Dill. Mun. Corp. (4th ed.) No. 686,991. It cannot be said that the right of the railroad company granted by the deed of the city is impaired by this improvement, for the reason that the grant is subject, by implication, to the exercise of this power by the city, for such grants are constructed strictly as against the railroad company and liberally in favor of the public, and nothing therefore is implied in favor of the grantee beyond the express letters of the grant, unless it shall be indispensible to give effect to the grant. (Railroad Co. v. Chicago, 12 Ill., 176; Railroad Co. v. City of Belleville 122 Ill., 376, 12 N. E. Rep. 680) and it is not indispensible to give effect to this grant that the city shall have no right to improve the parts of the streets upon which appellant's tracks are laid. The fact that the railroad company agreed to so grade the streets and so lay the railroad tracks that carriages, wagons, etc., may conveniently cross the same does not deprive the city of its power, nor absolve it from the duty, to

keep the street in safe and proper condition, and cannot be urged by appellant as an objection to this assessment. People v. City of Brooklyn, 65 N. Y., 349; Railway Co. v. City of Louisville, 8 Bush., 415."

"It is the unquestioned duty of the city, in controlling and improving the streets, to prepare them for public use, as streets, at such times, and in such manner as public necessity may require Holding them in trust for the public and having no authority to convey or divert them for other uses, it would seem inevitably to follow that they can have no power to grant to individuals rights or easements in the street which might in any way interfere with the duty of preparing them for the public use, to meet the public necessities, for it is obvious that if such rights may be granted them the practicable use of the streets may become so burdened with private rights as to place it beyond the ability of the city to discharge its duty to the public, with reference to them. It is not consistent to say that the city owes a duty to the public, and yet it may voluntarily place it beyond its power to discharge their duty." 76 Ill., 231.

If the ordinance of 1887, is to be given the construction contended for by the plaintiff in error, it would be void, not by reason of any defects in the manner in which powers vested in the council were exercised, but because it is wholly *ultra vires*, and beyond the power of the city or its council to make or enter into.

There can therefore be no estoppel arising under it, for the rule is well settled that in such cases the person contracting with the city is bound to know whether the contract is within the power of the city or council to make, and contracts at his peril.

1 Dill. Mun. Corp., 457, and notes and 935.

1 Beach Pub. Corp. secs. 217, 219, 241, 242, 243, 248.

"In general a municipal corporation is not estopped from denying the validity of a contract with its officers, when there has been no authority for making such a contract. The doctrine of *ultra vires* is applied with greater strictness to municipal bodies than to private corporations. The Supreme Court of Minnesota, with reference to this doctrine, said: 'A different rule of law would, in effect, vastly enlarge the power of public agents to bind a municipality by contracts, not only unauthorized, but prohibited by the law. It would tend to nullify the limitations and restrictions imposed with respect to the powers of such agents; and to a dangerous extent expose the public to the very evils and abuses which such limitations are designed to prevent.'"

1 Beach on Pub. Corp. sec. 625. Also sec. 627 and notes.

"Where a contract is void because of the express declaration of a statute, or because prohibited in terms, the retention by a municipality of the fruits of such contract will not subject it to liability, either under the contract or by a *quantum meruit*. No estoppel can ordinarily arise from the act of a municipal corporation or officer done in violation of or without the authority of law. Every person is presumed to know the nature and extent of the powers of municipal officers and therefore cannot be deemed to have been deceived or misled by acts done without legal authority."

1 Beach on Pub. Corp., Sec. 628, and notes.

"The municipality is given the exclusive care, supervision and control of the streets. Hand in hand with this power goes a corresponding duty to keep them open, in repair and free from nuisance. This implies a duty to see that the right of the public therein is not encroached upon. An encroachment which would prevent the reasonable use of the street by the municipality would be a nuisance, and power to validate such nuisance by a grant would be utterly inconsistent with the duty enjoined to keep the street free from nuisance."

"As we have seen, the city as to its streets, is a trustee for the use of the public. A trustee of property for the benefit of the public could not, any more than could a trustee of private property held for known, specific and continuing uses, alien or encumber the property to the prejudice of the beneficiary, and a purchaser dealing with the trustee, in either case would be bound to take notice at his peril, of the limitation of the power."

Elster v. Springfield, 49 O. St., Rep., pages 84 to 97.

In Goszler v. Georgetown, 6 Wheat., 593, this Court construed an act granting power to the corporation of Georgetown, "to make such by-laws and ordinances for the graduation and leveling of the street, etc., within the jurisdiction of the same town as they may judge necessary for the benefit thereof," and held that the same was a continuing power, not exhausted by its first exercise, and that the corporation had power from time to time to alter the graduation so made. In delivering the opinion of the Court, Mr. Chief Justice Marshall says:

"The second point presents a question of some difficulty. One object of the ordinance probably was, to give as much validity to the graduation made by the commissioners as if it had been made under the direct superintendence of the corporate body. But it cannot be disguised that a promise is held forth to all who should build on the graduated streets, that the graduation should be unalterable. The Court, however, feels great difficulty in saying that this ordinance can operate as a perpetual restraint on the corporation.

"When a government enters into a contract, there is no doubt of its power to bind itself to any extent not prohibited by its constitution. A corporation can make such contracts only as are allowed by the acts of incorporation. The power of this body to make a contract which should so operate as to bind its

legislative capacities forever thereafter, and disable it from enacting a by-law, which the legislature enables it to enact, may well be questioned. We rather think that the corporation cannot abridge its own legislative power."

Cited 11 Pet., 569; 10 How., 535; 16 How., 403; 7 Bank. Reg., 426, 2 Dill., 89; 7 Biss., 483.

In East Hartford v. The Hartford Bridge Co., 10 How., 535, Mr. Justice Woodbury, delivering the opinion of the Court says:

"In Goszler v. The Corporation of Georgetown, 6 Wheaton, 596-598, it was held that a city with some legislative power as to by-laws, streets, etc., could, after establishing a graduation for its streets, and after individuals had built in conformity to it, change materially its height. This case appears to settle the principle that a legislative body cannot part with its powers by any proceeding, so as not to be able to continue the exercise of them. It can and should exercise them, again and again, as often as the public interests require."

"Its members are made, by the people, agents or trustees for them on this subject, and can possess no authority to sell or grant their power over the trust to others."

The village of Defiance after the passage of the ordinance of 1887, and before the passage of the ordinance of 1893, was duly advanced to a city of the second class, and its council was the legislative body of said village and city.

R. S., Sec. 1672, provides, that:

"The legislative authority of villages shall be vested in a council consisting of six members," etc., "and the legislative authorities of cities," * * * "shall be vested in a council consisting of two members from each ward;" etc.

And the grant of the care, supervision and control of all public highways, streets, * * * and bridges, within the corporation, is made by said section 2640, not to the corporation generally, but directly to the council, as the legislative body of such corporation, and the duty to cause the same to be kept open and in repair, and free from nuisance, is imposed upon the council, as such legislative body.

Clearly, then the council could not make any contract, which would bind it or any succeeding council of said village or city, to permit said highway bridges over plaintiff's railway to be maintained at their present height, beyond such time as such council might, in the exercise of its discretion as to the performance of the trust and duty so granted to, and imposed upon it, deem it for the best interest of the public, to change the grade of said streets, so as to cross said railway at a level grade, and thus do away with said bridges, unless express authority for the making of such a contract, was given to said council by an act of the general legislative body of the state.

It is claimed by the plaintiff that such authority is given by section 3283 of the Revised Statutes of Ohio, which is as follows:

"Sec. 3283. If it be necessary, in the location of any part of a railroad, to occupy any public road, street, alley, way or ground of any kind, or any part thereof, the municipal or other corporation, or public officers or authorities, owning or having charge thereof, and the company, may agree upon the manner, terms and conditions upon which the same may be used or occupied; and if the parties be unable to agree thereon, and it is necessary, in the judgment of the directors of such company, to use or occupy such road, street, alley, way or ground, such company may appropriate so much of the same as may be necessary for the purposes of its road, in the manner and upon the same terms as is provided for the ap-

propriation of the property of individuals; but every company which lays a track upon any such street, alley, road, or ground, shall be responsible for injuries done thereby to private or public property lying upon or near to such ground, which may be recovered by civil action brought by the owner, before the proper court, at any time within two years from the completion of such track."

We submit that this section must be construed strictly and not extended by implication or intendment so as to give it an effect in derogation of the rights of the public; that the power therein granted is to be exercised only when it becomes necessary in the location of any part of railroad to occupy any public road, street, etc., or any part thereof; that the parts of the plaintiff's railroad which are at and near these crossings having been located more than 30 years before the passage of the ordinance of 1887, no power whatever existed in the council to do any act to make any agreement whatever under said section 3283.

But, however this may be, we further submit that the only thing which the council is thereby empowered to agree upon is the manner, terms and conditions upon which the street or highway may be used or occupied by the railway, that is to say, that it is confined to an agreement as to what part of the street the railway shall occupy, the height and grade at which the railroad shall be constructed in or across the street, the manner in which its tracks shall be ballasted, and what shall be required to be done by the company as a condition of its occupying such street, but the section does not give to the council the right to make any agreement with the company whereby the right and power of the council to grade or otherwise improve such street or highway is or may be abrogated, limited or controlled.

That this construction is correct we think follows from the further provision of the section touching the right of the company to appropriate so much of such street or highway as may be necessary for the purposes of its road.

It is manifest that the rights which may be acquired under it, either by agreement or appropriation, are the same.

It will hardly be claimed that the railway company could by an appropriation acquire the right to compel the city council to perpetually conduct the highways over the railroad by means of bridges and not to cross at a level grade. How then can it be claimed that such a result may be reached by an agreement?

If the state courts are right in holding with us on these propositions, there is an end of all federal questions raised upon the record, for it necessarily follows that no right, title, privilege or immunity arose or accrued to the plaintiff, by virtue of said ordinance of 1887, beyond the right to construct the present bridges, and maintain them until such time as the council saw fit to order the making of other crossings of said highways over said railway, as it has done by the resolutions and ordinances of 1893, and consequently there is no contract, the obligations whereof are, or will, or can be impaired by said ordinance of 1893.

Nor can any estoppel arise from such unauthorized act of the council as is abundantly shown by the authorities already cited.

Nor did the plaintiff thereby acquire any property, whereof it can be deprived by said ordinance or by the enforcement thereof.

III.

Further the ordinance of 1887, does not in terms establish the grade of the streets or relinquish the right of the

council to grade and improve such highways,as it may at any time thereafter deem best, and it cannot be extended by implication or intendment to have such meaning or effect; but must be construed strictly for the preservation of public rights.

On the contrary, we submit, that if the ordinance be a contract at all, it must be held that it was made in view of the continuing power of the council to grade and improve such streets from time to time as said council may deem for the benefit of the public, and, in view of its duty so to do, if necessary, to keep the streets in due repair and free from nuisance, and that these provisions of the statute are to be taken as forming part of the contract, if any such was created by the ordinance, and the acceptance thereof by the company.

IV.

But, even if the plaintiff acquired a vested right under the ordinance of 1887 to have said bridges maintained as the means conducting said highways over and across said railway, the utmost that can be claimed for such right is that it is an easement in said streets and highways appurtenant to the property, railway and right of way abutting on said streets, the taking or depriving the plaintiff of which would constitute damages to such abutting property, railway and right of way, for which the plaintiff would be entitled to compensation.

Such right to compensation for such damages, however, must have been asserted in the manner required by section 2315 of the Revised Statutes.

By section 2304, it is provided as follows:

"Sec. 2304. When it is deemed necessary by a city or village to make a public improvement, the council shall de-

clare, by resolution, the necessity of such improvement, and shall give twenty days' written notice of its passage to the owners of the property abutting upon the improvement, or to the persons in whose names it may be assessed for taxation upon the tax duplicate, who may be residents of the county, and publish the resolution not less than two nor more than four consecutive weeks, in some newspaper published and of general circulation in the corporation; provided, that in case of sewers, the twenty days' written notice to the owners of abutting property, or to the persons in whose names the abutting property is assessed, shall not be required; and, provided, that when there is no newspaper published in such village, written notices shall be posted in twelve public places in the village; and all plans and profiles relating to the improvement shall be recorded and kept on file in the office of the city civil engineer or clerk, and open to the inspection of all parties interested; and council may appoint a person to serve the notice provided for by this section, who shall make a return of the time and manner of such service, and verify the same by affidavit, which shall be filed with the clerk of the corporation, and the same, or a certified copy thereof, shall be *prima facie* evidence of the service of the notice, as therein stated; provided, that in cities of the first grade of the first class, the power to serve and publish such notice shall be vested in the board of city commissioners, provided for in the second chapter of this division."

And section 2315 provides as follows:—

"Sec. 2315. An owner of a lot, or of land, bounding and abutting upon a proposed improvement, claiming that he will sustain damages by reason of the improvement, shall within two weeks after the service or the completion of the publication of the notice mentioned in section twenty-three hundred and four, file a claim, in writing, with the clerk of the corporation, setting forth the amount of the damages claimed, together with a general description of the property with respect to which it is claimed the injury will accrue; *an owner who fails*

to do so shall be deemed to have waived the same, and shall be barred from filing a claim or receiving damages; and this provision shall apply to all damages which will obviously result from the improvement, but shall not deprive the owner of his right to recover other damages arising, without his fault, from the acts of the corporation, or its agents; provided, that if subsequent to the filing of such claim, the owner sells the property, or any part thereof, the assignee shall have the same right to damages which the owner would have had without the transfer."

And by section 2316, that "at the expiration of the time limited for filing claims for damages as provided in the last section, the council shall determine whether it will proceed with the proposed improvement or not," etc.

The remaining provisions of section 2316, and sections 2317, 2318, 2319, 2320, and 2321, provide for the assessment of such damages by a jury in the Court of Common Pleas or Probate Court of the county.

It cannot be doubted that the legislature had full power to provide the way and manner in which such damages should be claimed and assessed, and to make the failure of an abutting owner to assert its claim in the manner provided by statute a waiver thereof, and a bar to the recovery of such damages.

All of the steps required by section 2304 are shown by the answer to have been duly had by and under the order of the council in relation to these improvements, and especially the fact of the passage of the resolutions and publication and due service upon the plaintiff of the notice thereby required: and also the further fact that no claim for damages was made by the plaintiff under the provisions of section 2315. Printed Rec., 20 to 22, inclusive.

The allegations in this behalf are not denied by the reply, and, under the laws of Ohio, stand conclusively confessed.

It was also proved on the trial that Mr. Gould, the plaintiff's superintendent, was present at the time of the passage of the ordinance of 1893, and it was admitted by counsel that there never was any claim for damages made by the plaintiff.

The plaintiff, therefore, cannot be heard to say that it is deprived of property without due process of law, when said plaintiff itself refused to avail itself of the due process provided by statute for the assessment of these damages.

As part of this argument, we refer to the opinion of the Circuit Court in the original case by Moore, Judge, Wabash Railroad v. Defiance, 10 Ohio Circuit Court Reports, 27, and the opinion of the Supreme Court by Williams, Judge, 52 Ohio St. Reports, pages 298 to 318 inclusive, as completely refuting the claims of the plaintiff in error.

Respectfully submitted,

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